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AMERICAN ELECTRICAL CASES

(CITED AM. ELECTL. CAS.)

BEING

A COLLECTION OF ALL THE IMPORTANT CASES (EXCEPT-
ING PATENT CASES) DECIDED IN THE STATE AND
FEDERAL COURTS OF THE UNITED STATES
FROM 1873 ON SUBJECTS RELATING TO

THE TELEGRAPH, THE TELEPHONE, ELECTRIC
LIGHT AND POWER, ELECTRIC RAILWAY,
AND ALL OTHER PRACTICAL USES
OF ELECTRICITY

WITH ANNOTATIONS

EDITED BY

WILLIAM W. MORRILL,

Author of "Competency and Privilege of Witnesses," "City Negligence," etc

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AMERICAN ELECTRICAL CASES.

SOUTHERN BELL TELEPHONE & TELEGRAPH COMPANY V. CITY OF RICHMOND.

United States Circuit Court, Eastern District of Virginia, Feb. 24, 1897.

TELEPHONE AND TELEGRAPH COMPANY—MUNICIPAL CONTROL—POST-ROADS ACT.

Whether or not a telephone company is a telegraph company in the sense that it may avail itself of the privileges of the post-roads act of Congress of 1866, *held*, that the complainant was concededly, upon the pleadings, both a telephone and telegraph company, and so certainly within the protection of that statute.

All city streets which are letter carrier routes are post-roads within the meaning of the statute.

While companies to whom the statute applies must pay their due proportion of taxes and submit to the ordinary reasonable regulations of the State and municipal authorities whose highways they use and whose protection they claim and receive, they need not acquiesce in a city ordinance designed not to regulate their management but to destroy their existence.

The post-roads act applies not only to telegraph companies in existence when it was passed, but also to those thereafter organized and electing to accept its provisions. State and city laws in conflict therewith are inoperative and void as to companies organized under such laws but subsequently accepting the provisions of the Federal statute. So held of an ordinance repealing an ordinance granting permission to construct and maintain telegraph line in streets.

Cases of this series cited in opinion, appearing in bold faced type: *Attorney-General v. Edison Telephone Company of London*, vol. 2, p. 440, note; *Wisconsin Telephone Company v. Oshkosh*, vol. 1, p. 687; *Cumberland Teleph. & Tel. Co. v. United Elec. Ry. Co.*, vol. 3, p. 408; *State, Duke Pros. v. Central N. J. Teleph. Co.*, vol. 3, p. 546; *Chesapeake & Potomac Tel. Co. v. B. & O. Tel. Co.*, vol. 2, p. 416; *Pensacola Tel. Co. v.*

W. U. Tel. Co., vol. 1, p. 250; *Tel. Co. v. Texas*, vol. 1, p. 373; *W. U. Tel. Co. v. Atty.-Genl. of Mass.*, vol. 2, p. 57; *St. Louis v. W. U. Tel. Co.*, vol. 4, p. 102; *St. Louis v. W. U. Tel. Co.*, vol. 4, p. 115.

Stiles & Holladay and Hill Carter, for complainant.

C. V. Meredith, for defendant.

Goff, Circuit Judge: This case is now in my hands for hearing upon the bill of complaint and the demurrer thereto. The demurrer admits the allegations of the bill properly pleaded. Bearing this in mind, we will have but little trouble in reaching a conclusion on the questions now to be disposed of. The allegations in the bill claimed by the defendant to be legal conclusions from the facts and circumstances set forth, will not be considered as admitted by the demurrer, unless such facts and circumstances are found to clearly sustain the contention of complainant. The complainant is a corporation duly organized, and doing business under the laws of the State of New York, and the defendant is a municipal corporation, existing under the laws of the State of Virginia. The complainant is engaged in the business of a telephone company, in, through and between the States of Virginia, West Virginia, North Carolina, South Carolina, Georgia, Alabama and Florida, and has been so engaged for the past 15 years. It has, in conducting its business, erected and maintained lines of wires and poles, through and along certain of the streets and alleys of the city of Richmond, under and by authority of the common council and board of aldermen of said city, and by virtue of the laws of the State of Virginia and of the United States. It is alleged that the complainant is a telegraph company under the laws of the United States and of the State of Virginia, and that it was chartered as such under the general laws of the State of New York relating to telegraph companies. It is set forth in the bill that complainant, in the

city of Richmond, maintains a telephone office, connected by wires with a large number of subscribers, all of whom are connected with the office of the Western Union Telegraph Company in that city, and that all such subscribers may, and many of them do, transmit, through their instruments connected with said wires, and through such office of complainant, to the Western Union Telegraph Company, messages addressed and intended to be sent, and which are sent, to points in other States, the District of Columbia and foreign countries, under an agreement which has existed for years between the complainant and said Western Union Telegraph Company. Complainant also claims that its wires, poles and instruments, as located and used along and over the streets of the city of Richmond, are so located and used under the provisions of, and are protected by, the laws of the United States, for the reason that on the 13th day of February, 1889, it duly filed with the postmaster general of the United States its acceptance of the terms of the act of Congress entitled "An act to aid in the construction of telegraph lines, and to secure to the government the use of the same for postal, military and other purposes," approved July 24, 1866, by which it was, among other things, provided that any telegraph company then formed or thereafter organized under the laws of any State, which would file a written acceptance with the postmaster-general of the restrictions and obligations of said act, should have the right to construct, maintain and operate lines of telegraph over and along any of the military roads and post roads of the United States which had then been, or might thereafter be, declared such by law. It is also alleged that the city of Richmond, on the 26th day of June, 1884, in pursuance of the power given it by section 1288 of the Code of Virginia, passed an ordinance, by which the complainant was granted permission to erect poles, and run wires thereon, for the purpose of telegraphic communication

throughout the city of Richmond, on the public streets thereof, on such routes as might be specified and agreed upon by resolutions of the committee on streets from time to time, and upon the conditions and under the provisions of such ordinance. It is also alleged: That the city of Richmond, on the 14th day of December, 1894, passed an ordinance which provided that the ordinance approved June 26, 1884, granting the right of way throughout the city to the Southern Bell Telephone & Telegraph Company, be, and the same is hereby, repealed." That by the fifth section of said ordinance of December 14, 1894, all the privileges and rights granted by the ordinance of June 26, 1884, were to cease at the expiration of 12 months from the approval of said repealing ordinance. Other allegations in the bill set forth it will not be necessary to consider in disposing of the questions now before me.

The defendant insists that the act of Congress before mentioned, entitled "An act to aid in the construction of telegraph lines, and to secure to the government the use of the same for postal, military and other purposes," does not apply to the complainant; and that, therefore, the claim made in the bill that the complainant is entitled to the rights and benefits secured thereby is without merit. The insistence is that the complainant is a telephone company, and that said act of Congress only embraces telegraph companies. A number of courts, the decisions of which are worthy of our serious consideration, if not binding authority upon us, have held that a telephone company is a telegraph company, and that a company authorized to construct and operate telegraphs was empowered to establish a telephone service. On this question, see *Attorney-General v. Edison Tel. Co. of London*, 6 Q. B. Div. 244; *Wis. Teleph. Co. v. City of Oshkosh*, 62 Wis. 32; *Cumberland Teleph. & Tel. Co. v. United Electric Ry. Co.*, 42 Fed. Rep. 273; *State, Duke Pros. v. Tel. Co.*, 53 N. J. Law 341; *Chesapeake & P. Teleph.*

Co. v. Baltimore & O. Tel. Co., 66 Md. 410. In this case this contention is confidently made by counsel for complainant and vigorously denied by the attorney for the city of Richmond. I do not find it necessary to decide it, for the reason that, in my judgment, the statements set out in the bill, and admitted by the demurrer to be true, show that the complainant is both a telephone and a telegraph company, and clearly entitled, if the proper action relating thereto has been taken, to claim the benefits and the protection given by said act of Congress. It is distinctly charged, not only that the complainant is a telephone company engaged in such business in a number of States of the Union, but also that it is a telegraph company, chartered as such under the general laws of the State of New York. That being so, then the provisions of the act of Congress mentioned are applicable; and, whatever action may be found proper hereafter when all the facts are before the court, I hold that, so far as the demurrer is concerned, this insistence of the defendant is without merit.

The defendant also claimed in its written demurrer filed in this cause that, if said act of Congress was intended to give to a telegraph company the right to erect poles and run wires along the streets of the city of Richmond without the consent of said city, such legislation was unconstitutional and void. This position was abandoned in the argument, and it was conceded that such act was constitutional; that all streets of the city of Richmond which are letter carrier routes are post roads, within the meaning of said act; and that, under the same, a telegraph company can obtain a right of way for its poles and wires through and along the streets of a city without the consent of a municipality. These admissions are based on the decisions of the Supreme Court of the United States. *Pensacola Tel. Co. v. W. U. Tel. Co.*, 96 U. S. 1; *Telegraph Co. v. Texas*, 105 U. S. 460; *W. U. Tel. Co. v.*

Attorney-General of Massachusetts, 125 U. S. 530; *City of St. Louis v. W. U. Tel. Co.*, 148 U. S. 92; *Id.*, 149 U. S. 465. I think it is plain that the complainant, under the allegations in the bill contained, is a corporation entitled to exercise all the functions granted to telegraph companies under the laws of the State of New York, and that, under the act of Congress referred to, it has the privilege of running its lines through and over the streets of the city of Richmond, that are post roads of the United States, and that said city has no right to prevent it from so doing. While it is true that telegraph companies claiming the right under the laws of the United States to enter the territory of a State, and erect their poles and lines therein, must pay their due proportion of taxes, and submit to the ordinary reasonable regulations of the State and municipal authorities whose highways they use, and whose protection they claim and receive, still it is also true that neither the State nor the municipal authorities can prohibit them from entering their respective jurisdictions, nor require them to remove therefrom after they have established their lines. Such companies must submit to proper and reasonable local regulations, but they will not be expected to acquiesce in a city ordinance, not intended to regulate its management, but passed for the purpose of destroying its existence.

I think the bill alleges such facts as show the complainant to be engaged in interstate commerce, and I find that the claim of defendant, that the business of complainant company is purely local in character, is not sustained. The case made by the pleadings is as I have indicated. What the result may be when the evidence is in is yet to be found.

The defendant also insists that if the complainant erected its poles and lines under the authority of the ordinance of the city of Richmond passed June 26, 1884, it cannot afterwards, by accepting the provisions of the act

of Congress of July 24, 1866 (14 Stat. 221; Rev. St. sec. 5263 et seq.), thereby render of no effect the stipulations contained in said city ordinance. To what extent the complainant is bound by the terms of the ordinance of June 26, 1884, it is not necessary to determine; but that it is protected by the act of Congress referred to (by virtue of its acceptance of the restrictions and obligations of the same, which was filed with the postmaster-general of the United States February 13, 1889), and that it may rely upon it for the purpose of preventing its poles and lines from being removed, and its property destroyed, is, I think, under the circumstances set forth in the bill, so clear that there is not room for doubt. Said act of Congress was intended to apply to telegraph companies in existence at the time it was passed, as well as those that might be organized thereafter, provided such companies accepted the terms of the same in manner before mentioned. If such companies had been organized under State laws, and had been transacting business under the provisions of municipal ordinances, and then subsequently accepted the terms of said act of Congress, it follows that the State and city laws, in so far at least as they conflicted with such national legislation, were inoperative and void, and for the reason that they concerned matters over which the Congress had supreme control by virtue of direct constitutional authority.

Holding as I do on the questions referred to, it becomes immaterial to further consider the matters raised by the demurrer and discussed by the counsel, for the reason that, decide them as I may, still the jurisdiction of the court to hear and determine this case must be maintained. They can be considered hereafter, if necessary, when they have been more fully presented by answer and testimony. I will pass decree overruling the demurrer, and giving the defendant the usual time in which to answer. The

Illuminating Co. v. Hooper, Mayor et al.

injunction as prayed for by complainant will be granted, to remain in force until the further order of this court.

NOTE.—See note to *Grand Av. Ry. Co. v. People's Ry. Co.*, *post*.

EDISON ELECTRIC ILLUMINATING COMPANY OF BALTIMORE
v. ALCAEUS HOOPER, MAYOR, ET. AL.

Maryland Court of Appeals, Jan. 7, 1897.

MUNICIPAL CONTROL.—CONSTRUCTION OF STATUTE.

Statutes granting to certain corporations the right "to transact any business in which electricity over or through wires may be applied to any useful purpose," and conferring certain rights and privileges upon said corporations in the city of Baltimore, *held*, to merely grant the franchise to operate as electric light and power companies in said city, subject, however, to the paramount right and power of the municipality to regulate and maintain the streets of the city for the use of the public.

APPEAL by petitioner from judgment of Baltimore City Court, dismissing petition for mandamus to compel the issuance and approval, by the proper city officials, of a permit to lay electric conduits in certain streets of Baltimore.

Munnickhuysen, Bond & Duffy and Hugh L. Bond, Jr., for appellant.

Thomas I. Elliott and Thomas G. Hayes, for appellee.

BRISCOE, J.: On the 8th of May, 1896, the appellant, the Edison Electric Illuminating Company of Baltimore, made application to the city commissioner, one of the appellees, for a permit to dig up and uncover certain of the streets of Baltimore, for the purpose of laying and constructing a system of conduits or trenches to contain

its conductors for transmitting electricity to be used for electric light and power, in accordance with sections 157 E and 157 G of article 48 of the Baltimore City Code of 1893. The application states its object to be to obtain permission to dig up, tear up or uncover the streets mentioned in the application, so far as may be necessary, for the purpose of connecting, constructing or building its lines or conductors, and for the purpose of connecting the said lines or conductors with any manufactory, public or private building, lamps or other structure or object. It further states: "It is the object of this application to remove all wires owned by the company on the streets named, and substitute for the same, lines and conductors laid under ground, in accordance with what is known as the 'Edison System;' the right to construct or build said lines or conductors having been granted to both of the companies by the consolidation whereof this company was formed, by Acts 1890, c. 233." This application was refused by the city commissioner, for the reason, as stated by him: "I must decline to issue such a permit, having been advised by one of the city's law officers that, in the absence of an ordinance granting your company the right to construct conduits, I would have no right to do so." Whereupon the petition in this case was filed for a mandamus, to require the city commissioner to issue, and the mayor of Baltimore city to approve, a permit to the appellant for the purpose mentioned therein. The case was tried below before the court, and from a judgment in favor of the defendants this appeal has been taken.

The controlling question, then, is: Was it necessary that the assent of the mayor and city council of Baltimore should be given by ordinance to the appellant to use the streets for its trenches, before it was entitled to demand and require the appellee to issue the permit in question, or did Acts 1890, c. 233, confer this right without such ordinance? This involves a construction of this act, and

the intent of the Legislature in its passage, and what are the powers conferred by it on the corporations therein named. The act declares that it is an amendment to the charters of the corporations named in it, and that these corporations were incorporated under the general incorporation act of the State (article 23 of the Code). The words of the amendment, as contained in the act, are as follows:

They are hereby authorized to transact any business in which electricity over or through wires may be applied to any useful purpose, and to that end, all the rights and privileges mentioned in section 111 of article 23 of the Code, title "Corporations," are hereby conferred upon said corporations in Baltimore city, as fully and to all intents and purposes as though said corporations had been formed to carry on any business in any city or town of Kent or Talbot counties, and all acts or parts of acts inconsistent herewith are hereby repealed.

And section 111 of article 23 of the Code was made a part of this act. It appears by this last-named section that the franchise or corporate capacity of being an electric light or electric power company was conferred on certain corporations named in it, specifying their powers, and where they could be exercised; but it was provided that nothing contained therein authorized the incorporation of electric light companies for the purpose of carrying on business and conducting operations in Baltimore city. It is clear then, that, as the constituent corporations of the appellant were incorporated under the twenty-third article of the Code, they did not possess the franchise of carrying on the business of electric light companies in the city of Baltimore prior to the passage of the act of 1890. Does this act, then, empower them to both carry on the business of an electric light company, and to conduct its operations in the streets of Baltimore, as contended for on the part of the appellant? The only power, we think, conferred on these corporations and the appellant, under the act, is the franchise of being an electric light company in Balti-

more, and confers no right or privilege to use the streets of Baltimore without the assent of the mayor and city council of that city by ordinance duly passed. The language of the act in question, in connection with the previous legislation on this subject, shows this to have been the only intent of the Legislature in passing it. The first part of the act provides as to the corporations named that they "are hereby authorized to transact any business in which electricity over or through wires may be applied to any useful purpose." Now, if the act had stopped or ended here, no right or privilege would have been conferred because of the prohibitory clause in section 111. But there is added this provision:

And to that end all the rights and privileges mentioned in section 111 are conferred upon said corporations in Baltimore city as fully and to all intents and purposes as though said corporations had been formed to carry on business in any city or town of Kent or Talbot counties.

There is no special grant or privilege here conferred by this act to use the streets for constructing conduits without the assent of the mayor of Baltimore and of its city council. The sole effect of the act was to enable the corporations named and the appellant to have the franchise of an electric light and power company, which they did not possess prior to the passage of the act, and to permit the operation of those corporations in Baltimore city, as in Kent and Talbot counties, subject, however, to the paramount right and power of the municipality to regulate and maintain the streets of the city for the use of the public. And this construction, we think, is strengthened by reference to the contemporaneous legislation on this subject, as provided by chapter 370 of the Acts of 1890. But, apart from this, it appears by section 254, art. 23 of the Code, which is a codification of sub-section 175B, sec. 2, c. 161, of the Acts of 1886, and a part of the charter of the corporations of the appellant, as well as the appellant,

that all corporations incorporated or to be incorporated by virtue of said section 24, class 11, except such corporations of said class as are now in practical operation, and have laid or constructed their lines, or any part thereof, in the city of Baltimore, shall obtain a special grant from the general assembly of Maryland, and the assent and approval of the mayor and city council of Baltimore, before using the streets or highways of Baltimore, either the surface or the ground beneath the same. And it further appears that both of the corporations of the appellant come under class 11 by the terms of their charter, and were not in practical operation, or had constructed their lines, in the city of Baltimore prior to the date of the approval of the act of 1886. It, therefore, follows that, by virtue of the requirements of this last-named act, the appellant must obtain the assent and approval of the mayor and city council, as well as a special grant from the general assembly, before it is lawfully entitled to the relief asked under this petition.

Nor are we aware of any law or rule of construction, even should it be conceded that the grant in question is ambiguous, by which the position of the appellant can be maintained. It is a well settled rule of statutory construction, says the Supreme Court of the United States in *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, that every public grant of property or of privileges or franchises, if ambiguous, is to be construed against the grantee, and in favor of the public, because an intention on the part of the government to grant to private persons, or to a particular corporation, property or rights in which the whole public is interested cannot be presumed unless unequivocally expressed, or necessarily to be implied in the terms of the grant, and because the grant is supposed to be made at the solicitation of the grantee, and to be drawn up by him or by his agents, and therefore the words are to be treated as those of the grantee; and this rule of

construction is a wholesome safeguard of the interests of the public against any attempt of the grantee, by the insertion of ambiguous language to take what could not be obtained in clear and express terms. Our conclusion, then, is, there was no duty imposed on the appellees in this case to issue to the appellant the permit in question. There being, then, no error in the rejection of the appellant's prayers, and in dismissing the petition for mandamus, the judgment will be affirmed. Judgment affirmed, with costs.

NOTE.—See note to *Grand Av. Ry. Co. v. People's Ry. Co.*, *post*.

HOWARD C. LEVIS, TRUSTEE, v. CITY OF NEWTON AND
NEWTON ELECTRIC COMPANY.

*United States Circuit Court, Southern District of Iowa, C. D. August 18,
1896.*

STREET USE FOR ELECTRIC LIGHTING.—MUNICIPAL CONTROL.—INJUNCTION.

Statutes empowering municipal corporations to light their streets, and to make ordinances for carrying into effect such powers, include the authority to such corporations not only to furnish light but to enter into contracts for its furnishing by others, and to grant franchises to electric light companies to use the streets in the construction and operation of their lines and plants. This especially in view of legislative and judicial construction of such and similar statutes; and of the great expenditures which have been made by gas and electric light companies in reliance upon the validity of such franchises.

The fact that such ordinance granting franchise to an electric light company declares it to be "permanent and perpetual" does not, even though the authorities had no power to make such grant, invalidate the entire ordinance.

Not only the lighting of streets and public places, but the supplying of light to citizens generally, is a sufficient public use to sustain the grant of the right to use the streets for operation of the plant furnishing such light.

If an ordinance granting permission to use streets for electric lighting

purposes does not disclose whether the use granted is for public or private purposes, and it may be for either, the ordinance being valid in the one case and void in the other, the court will assume that it is granted for public purposes and therefore valid.

An ordinance granting a franchise to maintain electric lighting apparatus in streets cannot be changed or repealed by the municipal authorities, in absence of any constitutional or statutory permission, or any right to do so reserved in the ordinance.

Temporary injunction granted at suit of mortgagee of grantee of franchise to restrain municipality, itself the proprietor of a rival electric lighting plant, from enforcing an ordinance repealing the franchise.

Cases of this series cited in opinion, appearing in bold faced type: *Thomson-Houston Electric Co. v. Newton*, vol. 3, p. 507; *St. Louis v. W. U. Tel. Co.*, vol. 4, p. 115.

APPLICATION for preliminary injunction. Facts stated in opinion.

Gatch, Connor & Weaver and *James S. Cummins*, for plaintiff.

Guernsey & Bailey and *O. C. Meredith*, for defendants.

WOOLSON, District Judge: As the hearing for injunction was had upon the bill, with affidavit of plaintiff sustaining the averments of fact therein, the substance of the bill should here be stated:

The defendant, City of Newton, is a municipal corporation (city of the second class) organized under the General Statutes of Iowa. In January, 1887, the city council of said city duly enacted an ordinance (No. 129) providing that:

H. M. Vaughn and his assigns are hereby granted the right and privilege to place in the streets and alleys of the city of Newton poles for the purpose of supporting wires, and to place upon such poles such wires as may be necessary to transmit electric power and incandescent electric light; the placing of said poles to be subject to the advice and control of a committee to be appointed for that purpose by the city council; provided, that such poles and wires shall be placed in such a way as not to obstruct the free use of or travel over said streets and alleys in which the same shall be placed.

Sections 2 and 3 provide that, if any such poles or wires are so placed as to interfere with such free travel and use, Vaughn must, on written notice, change location of same, so same shall not so interfere, etc.; and if, being thus notified, he shall not immediately so change place of location, the city council shall so change same at his expense.

Sec. 4. The right and privileges hereby granted by this ordinance shall be permanent and perpetual.

That forthwith, and relying on said ordinance, said Vaughn proceeded to erect and build an electric light plant, set poles, string wires, etc., and on August 1, 1887, had such plant in operation, and was engaged in supplying light and power to the inhabitants of said city, the expenditure therefor and therein amounting at that date to \$12,500. On October 21, 1887, said Vaughn assigned, transferred, and set over to the Thomson-Houston Electric Company all his rights and privileges and franchises derived under said ordinance; and said grantee took possession of said plant, and operated same until March, 1896, when said company sold and transferred said electric light plant, and property, rights, franchises and privileges, to the defendant, Newton Electric Company, a corporation duly incorporated under the General Statutes of Iowa. As part of the consideration of said sale, said Newton Electric Company executed its promissory notes for \$10,000, and, to secure same, executed a trust deed upon all its plant, property, etc., plaintiff being named therein as trustee, which said notes are wholly unpaid. At the date of the enactment of above-named Ordinance No. 129, an electric plant was being operated in said city of Newton by a company known as the Newton Electric Light Company, with whom said city had previously contracted for furnishing electric lights for street purposes—said contract, by its terms, to continue until January,

1890; and said last-named company did furnish electric light thereunder until April, 1888, when said company became insolvent, and assigned its said contract to said Thomson-Houston Company, which last-named company connected its plant and wires with the wires of said Newton Electric Light Company, and proceeded to fill the said contract of street lighting. On April 16, 1888, the city council of defendant, City of Newton, ratified said assignment of said contract, and authorized said Thomson-Houston Electric Company to carry out said street lighting contract; and the last-named company furnished such street lighting thereunder until in January, 1890, using the plant, poles and wires erected by said Vaughn under said ordinance, but expending in completing, etc., its plant for fully carrying out said contract, an additional sum of \$4,000. About January, 1890, said city of Newton constructed a city electrical plant, for furnishing electric light and power to its streets, and also to the inhabitants of said city, in active competition with said electric company, and has since continued so to do. Said city has a population of about 3,500, and electric lighting for the streets of said city is supplied by the city plant, while the private lighting by electricity is about evenly divided between said city plant and that of said Newton Electric Company. On March 30, 1896, the city council of Newton passed an ordinance (No. 211) entitled "An ordinance to repeal Ordinance No. 129, and to require the removal of the poles and wires placed in the streets and alleys of the city of Newton thereunder, and to prohibit the further erection of poles and wires in said streets and alleys."

By the first section of this ordinance, Ordinance No. 129, above given, is "hereby, in all respects, repealed." Section 2 provides:

That it shall be the duty of every person or corporation now maintaining poles in the streets and alleys of the city of Newton, and claiming to have erected the same under the said Ordinance No. 129, to remove the same

from the said streets and alleys within ninety days after this ordinance shall take effect.

Section 3 provides that the ordinance shall take effect five days after its passage and publication, etc., and the bill avers due publication thereof.

The bill further alleges that the construction and operation of the electric plant now owned by said Newton Electric Company, and the occupation, under the provisions of said Ordinance 129, of the streets, etc., of the city with its poles and wires, were not for private use, but—

Only for public use, and for the supply of light and power to said city and all its inhabitants, equally, whenever requested by them, and at just and reasonable rates; that said Newton Electric Company and its assigns have been at all times, and are now, able, ready, and willing to perform such public service upon just and reasonable terms of compensation; and that the sole design and purpose of said city of Newton in attempting to repeal said Ordinance No. 129 was and is to prevent competition with its own electric plant, to drive said Newton Electric Company out of the electric lighting business in said city and to practically destroy, or render worthless, its plant, machinery, and appliances.

It is further alleged that said Newton Electric Company has no other assets or property than that included in the trust deed to plaintiff, and that the removal of said poles and wires from the streets and alleys of said city would destroy the only security held or attainable by plaintiff for the notes secured by his trust deed, and that said repealing ordinance is void, as (1) impairing the obligation of a valid contract between the city and said Newton Electric Company, and between said city, said company and plaintiff; as (2) depriving said company and plaintiff of their property without due process of law; as (3) denying said company and plaintiff the equal protection of the laws; and (4) taking said property for public use without compensation.

The issues presented on the hearing relate almost entirely to the right or legal power of the city of Newton to grant the franchise in said Ordinance No. 129 attempted. On the one hand, plaintiff contends that said ordinance granted to Vaughn and his assigns is a valid, irrevocable franchise to use the streets of said city in the operation of the electric plant which was erected and put in operation under said ordinance. This, of course, involves the further assertion that the municipality of Newton had been authorized, by legislative delegation of power, to grant such a franchise. On the other hand, the defendants contend that no such legislative delegation of power existed at the date of the passage of said Ordinance No. 129, and, therefore, of necessity, no grant of franchise passed under or by virtue of such ordinance. Defendants concede that, if said ordinance conferred a valid franchise on Vaughn and his assigns, the city could not repeal the same in the manner attempted by subsequent Ordinance No. 211. Stated more specifically, defendants' contention is: (1) The grant attempted in said Ordinance No. 129 is absolutely void. (2) In no event could said grant, if of any validity, be considered as more than a license revocable at the election of the city. (3) The city could not by ratification make valid a grant which was originally invalid.

Judge Dillon, in his valuable treatise on the Law of Municipal Corporations (4th ed. sec. 89), defines the powers of a municipal corporation as follows:

"It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in, or incident to, the powers expressly granted; third, those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation,

and the power is denied. Of every municipal corporation, the charter or statute by which it is created is its organic act. Neither the corporation nor its officers can do any act, make any contract, incur any liabilities, not authorized thereby, or by some legislative act applicable thereto. All acts beyond the scope of the powers granted are void."

And this rule of construction is affirmed by the Supreme Court of Iowa in *Henke v. McCord*, 55 Iowa, 381; *Becker v. Waterworks*, 79 Iowa, 419. The principle of construction, with respect to the power of municipal corporations laid down by the Supreme Court of the United States in *Minturn v. Larue*, 23 How. 435, 436, in the words of Mr. Justice NELSON, is as follows:

"It is a well settled rule of construction of grants by the Legislature to corporations, whether public or private, that only such powers and rights can be exercised under them as are clearly comprehended within the words of the act, or derived therefrom by necessary implication, regard being had to the objects of the grant. Any ambiguity or doubt arising out of the terms used by the Legislature must be resolved in favor of the public."

See, also, *Ottawa v. Carey*, 108 U. S. 110, 121, and *Barnet v. Denison*, 145 U. S. 135, 139.

The first, and perhaps the most important, contention herein, is as to what powers with respect to the subject matter of Ordinance No. 129, above stated, had been delegated by the legislative authority of the State of Iowa to the city of Newton. We turn to the general statutes of Iowa with reference to incorporations of cities of the second class. Counsel for the plaintiff point out in their brief two sections (Code Iowa 1873) which they claim confer this power, viz.:

Sec. 464. They shall have power to lay off, open, widen, straighten, narrow, vacate, extend, establish and light streets, alleys, public grounds

wharves, landing and market places, and to provide for the condemnation of such real estate as may be necessary for such purpose.

Sec. 482. Municipal corporations shall have power to make and publish, from time to time, ordinances, not inconsistent with the laws of the state, for carrying into effect or discharging the powers and duties conferred by this chapter, and such as shall seem necessary and proper to provide the safety, preserve the health, promote the prosperity, improve the morals, order, comfort and convenience of such corporation and the inhabitants thereof, and to enforce obedience to such ordinances by fine not exceeding one hundred dollars, or by imprisonment not exceeding thirty days.

These two Code sections seem to constitute the only express delegation of authority to incorporated cities in Iowa, at the date of the passage of said Ordinance No. 129, with reference to the subject matter of said ordinance. If this ordinance is rightly construed as having for its purpose to provide for lighting the streets and public places of the city of Newton, many of the obstacles otherwise appearing in the consideration of the matters submitted would not be encountered. According to many well considered cases, the power granted to the city to light its streets not only authorizes the city itself to furnish the lighting, but, as well, empowers it to contract with others to furnish such lighting. Thus in *Garrison v. Chicago*, 7 Biss. 480, Fed. Cas. No. 5,255, Circuit Judge DRUMMOND says:

“By its charter, the city had authority to light the public streets, and, it is to be inferred, the public buildings and offices, and to levy and collect a tax for that purpose. The power to provide the necessary means for lighting the streets, buildings and offices, either by the construction of a gas manufactory or by contract, would seem to follow as a matter of course.”

In *City of Newport v. Newport Light Co.*, 84 Ky. 166, 177, the court say:

“If it is the duty of the municipality to light its public streets, and furnish its inhabitants with the means of obtaining gas at their own expense, it necessarily follows

that it has the implied power to contract with others to furnish it in like manner."

Analogous to this reasoning is that stated by the Supreme Court of Iowa in *Town of Spencer v. Andrew*, 82 Iowa, 14. Section 456 of the Iowa Code empowers incorporated cities "to establish and regulate markets, to provide for the measuring or weighing of hay, coal or other articles for sale." When considering the question as to the power of a city to permit the erection by one of its citizens of a certain scale in the streets of the city, the court say (page 17):

"If cities and towns may maintain scales of their own, in the public streets, to facilitate the weighing of hay, coal or other articles of sale, we see no good reason why they may not, under reasonable restrictions, authorize others to maintain scales, whereby the public convenience will be served."

The same general line of reasoning is applied in *LeClaire v. City of Davenport*, 13 Iowa, 210, 212. In *City of Davenport v. Kelley*, 7 Iowa, 102, the Supreme Court of Iowa, in construing the provision of the city charter which gave to the city power "to erect market houses, establish markets and market places, and provide for the government and regulation thereof," had held that the quoted provision did not empower the city, by ordinance, to authorize citizens therein named to erect market houses which should be "public markets," wherein vendors of fresh meats, etc., could be compelled to expose their marketing, but that the quoted provision contemplated "the erection of markets by the city, to be under its entire control, and that it has no right to delegate this power to individuals, for their benefit and profit," etc. In the *LeClaire* case, *supra*, the court reversed its holding, and, in substance declared that the power given to the city to erect markets authorized the city to confer on, or delegate to others, the erection, etc., of a public market. In *Thomson-Houston*

Electric Co. v. City of Newton, 42 Fed. Rep. 723, 725, Judge SHIRAS, in considering the point therein urged, that by the Iowa statutes the city is not authorized to furnish lights for use in the houses or stores of its citizens, but is restricted to furnishing lights for its streets and public places, says:

“It has been the uniform rule that a city, in erecting gas works, is not limited to furnishing gas or water for use only upon the streets and other public places of the city, but may furnish the same for private use, and the statutes of Iowa now place electric light plants in the same category.”

The point now under consideration, as to whether, prior to said statute of April, 1888, an incorporated city in Iowa had legislative authority to make the grant or franchise attempted in this Ordinance No. 129, is of great and wide reaching importance in Iowa; for the statutes of the State prior to April, 1888, confer no express legislative authority on cities to grant franchises to gas companies. And a holding adverse to such municipal franchise to electric light companies would prove equally disastrous to gas companies. Is it possible that the numerous gas companies within the State, organized before April, 1888, and taking what were then believed to be, and relied upon as being, franchises from different cities of the State, hold merely municipal licenses, which are revocable at the pleasure of the councils of these different cities? Hundreds of thousands of dollars have been invested, in some of these cities, in constructing and extending gas works and electric plants. Can it be that these vast financial interests are so situated that merely by a repealing ordinance, and notice to the companies interested, requiring them to vacate the streets of the city, those plants and works may be thus destroyed? Manifestly, the value of a gas plant largely consists in its gas mains buried in the streets, and which cannot be readily removed. If the city may, at the pleasure of its council, terminate, by a repealing ordinance,

the right theretofore given to use the streets, and thus make further use of the streets in the operation of the plant a nuisance, these plants, with their large capital, are at the pleasure and mercy of the city council.

Counsel for plaintiff insist that the court may take judicial notice that in most of the older and larger cities of this State the gas and electric plants therein received, prior to April, 1888, the authority or permission, on which they acted, to lay their pipes or erect their poles and wires in the streets of the city, and that if it were permissible to construe the force and effect of legislative authority delegated to our municipalities by the construction which the cities themselves at the time placed thereon, and on the strength of which capital had been invested thereunder, the question under consideration might be quickly decided. If usage could determine the question, it might be readily determined. But mere usage will not here avail us. When treating on usage as affecting municipal powers and their construction, as applied in the United States, Judge Dillon says (section 92, Mun. Corp. 4th ed.):

“It is a necessary result of the manner in which our municipal corporations are created, viz., by express legislative act, wherein their powers and duties are wholly prescribed, that the powers themselves cannot be added to, enlarged or diminished by proof of usage.”

In section 93 this learned writer and jurist adds:

“But general and long continued usage is not without importance, and usage of this character may be resorted to in aid of a proper construction of the charter or statute, but no further. If the language be uncertain or doubtful, a uniform, long established and unquestioned usage will be regarded by the courts in determining the mode in which powers may be exercised, and, to a reasonable extent, in determining the scope of the powers themselves; but usage can here have no room for operation, when the

language of the enactment is plain, and the legislative intent is clear upon the face of it."

And Judge Dillon quotes (section 93) with approval from the decision of Chief Justice Biglow in *Hood v. Lynn*, 1 Allen, 103:

"Abuses of power and violations of right derive no sanction from time and custom. A casual or occasional exercise of power by one or a few towns will not constitute usage. It must not only be general and of long continuance; but, what is more important, it must also be a custom necessary to the exercise of some corporate power, or the enjoyment of some corporate right.

Counsel for plaintiff have cited us to statutory provisions which are urged as proof that the legislative branch of the State regarded municipal corporations within Iowa as having, prior to April, 1888, power to confer franchises in the direction attempted in said Ordinance No. 129. Thus, in chapter 89, Acts 19th Gen. Assem. (approved March 15, 1882), it is provided that:

Cities organized under the general incorporation laws of the State, in addition to the powers now granted them, shall have power: . . .

Section 8. To require the connection from gas pipes, water pipes and sewers to the curb-lines of adjoining property, to be made before the permanent improvement of the street whereon they are located, and to regulate the making of such connections on streets already improved, and to enforce such requirement as provided by law.

The argument of counsel for plaintiff as to this statute is, substantially, that the statutes of Iowa, up to the act of April, 1888, above referred to, were equally silent as to municipal power to grant gas and to grant electric light franchises; that the same reasoning employed by counsel for defendants which would hold that the municipality was without power to grant an electric light franchise would prove the same lack of power to grant a gas franchise; that, in this respect, gas and electric light franchises stand on the same footing; therefore whatever

shall prove that cities in Iowa had, previous to April, 1888, the power to grant gas franchises, will prove as well their power, under the Iowa statutes, to grant electric light franchises. In the same connection, counsel for plaintiff refer to chapter 116, Laws 21st Gen. Assem. Iowa (approved April 9, 1886), amending chapter 89, 19th Gen. Assem., as follows:

Sec. 8. City councils of all cities organized under the general incorporation laws and special charters of Iowa, shall have power to require the connections from gas pipes, steam-heating pipes and sewers to the curb line of adjacent property to be made before the permanent improvement of the street whereon they are located; and to regulate the making of such connections on streets already improved; and in case the owners of property on such streets shall fail to make such connections within the time fixed by such council, they may cause such connections to be made and to assess against the property in front of which such connections are made, the cost and expense thereof.

It will be noticed that "steam heating pipes" are included in the statute just quoted. So far as appears, this is the first statutory recognition in Iowa of steam heating pipes laid in the streets of cities. And the logical application of defendants' argument would place the steam heating plants in the different Iowa cities in the same position with gas and electric plants, viz., that the authority—prior to April, 1888—from the city council to lay these pipes in the streets, or erect poles and string wires thereon, is but a municipal license, revocable at the pleasure of the council. Counsel for plaintiff also refer to chapters 1 and 16 of the Laws of the 22nd General Assembly of Iowa. These chapters were enacted at the same session with the chapter approved April 9, 1888, above referred to, wherein express power is given cities to establish and maintain gas and electric plants. Chapter 1 was approved the same day (April 9th), while chapter 16 was approved April 10th—the day following. Chapter 1 relates to and creates a "board of public works" for cities of the first class (being cities of over 15,000 inhabitants),

while chapter 16 grants additional powers to cities of the first class, and cities of the second class having over 7,000 inhabitants. The provisions of neither of these chapters apply to the city of Newton. But the chapters may be of value in ascertaining the legislative construction of existing general statutes (applying equally to cities of the first and second classes) with reference to the power of cities in Iowa to grant authority to lay gas pipes or place electric light poles and wires in the streets. By chapter 1 the board of public works is required (section 6) "to advertise for bids and make contracts for the lighting of the streets," etc.; (section 9) "to take especial charge of the construction, repairing and superintendence of all streets, alleys, . . . lamps and light for lighting the streets, alleys, . . . and public buildings of such cities;" (section 16) "to superintend the laying of all water, gas and steam heating mains and all connections therefor, and laying of telephone, telegraph . . . and electric wires in the manner provided by the ordinances of such city." Chapter 16 enacts that the cities therein named, "in addition to powers now granted, shall have further and additional powers, . . . to regulate telegraph, . . . electric light . . . and other electric wires, and provide the manner in which, and places where, the same shall be placed, upon, along or under the streets and alleys of such city; to regulate the price of gas, electric light . . . rates; to fix charges for making gas, electric light . . . connections," etc. Counsel for defendants contend that these chapters can easily be construed as supplementing chapter 11. But the difficulty is that if this view is taken, and these chapters (1 and 16) be held merely to supplement chapter 11, and not to apply to gas, electric and steam heating plants occupying or using the streets under authority granted prior to the enactment of said chapter 11, no statutory provisions exist which authorize Iowa cities to exercise such powers with regard to said pre-

viously authorized plants. It can scarcely be assumed that the legislative branch of the State intended to thus limit the exercise of these regulating powers by the cities to whom they are granted, while, if we assume that the intention was to empower cities to exercise such powers towards previously as well as subsequently authorized plants, there is involved a legislative recognition of such previously authorized plants.

Turning now to the judicial branch of the State, counsel for plaintiff refer us to decisions of the Iowa Supreme Court which are claimed to construe the powers held previous to 1888 by cities with regard to granting franchises to gas companies. *Des Moines Gas Co. v. City of Des Moines*, 44 Iowa, 505, was decided in 1876. The defendant city had, by ordinance in 1864, granted to plaintiff gas company "the exclusive privilege of laying pipes for the conveyance of gas in all the streets and alleys in the city" for the term of fifteen years, the plaintiff to furnish defendant gas as might be ordered by the city council, for \$3 per 1,000 feet. In 1875 the city council was considering, and about to pass, an ordinance repealing said former ordinance, and contracting with others than plaintiff to supply the city with gas. An injunction was sought to restrain the city council from passing the last-named ordinance. The question before the court is declared (page 508) to be "whether the courts have jurisdiction or power to restrain by injunction, under the circumstances above stated, the passage of the proposed ordinance." The Supreme Court quote, as the sections under which the council passed its original ordinance granting to plaintiff company authority to lay its pipes in the streets of the city, sections 464 and 482, Code above copied. The court then say:

"It will be readily seen the city had ample power to pass the ordinance under which plaintiff claims, and that it was a proper exercise of corporate authority, unless the

grant of the exclusive privilege therein contained rendered it void, and that it now has the requisite authority to pass the ordinance sought to be enjoined, unless prohibited from so doing by reason of the existence of the former."

The decision of the court, denying the plaintiff's right to injunction, is based on other grounds, viz., that a court of equity may not enjoin and restrain the city council from passing the second ordinance, since such court may not interfere with the legislative rights of such council. Yet at the very threshold of the discussion leading to the decision the Supreme Court, in the words above quoted, recognize the power of the council to pass an ordinance granting the use of the streets by the gas company for laying its mains, erecting its lamp posts, etc. Counsel for defendants insist that the argument thus drawn does not apply to electric light plants, even if it be held applicable to gas plants, since the latter plant is no substantial obstruction to the free use of the streets, while the poles and wires of the former are a continuing obstruction, affecting the public and abutting property owners. This difference is simply one of degree, and, in my opinion, does not lessen or affect the power of the city to grant the authority. Assuming the fact stated by counsel for plaintiff, and not denied by counsel for defendants, and of which the court, perhaps, might take judicial notice, viz., that prior to the act of April 9, 1888, expressly giving power to city councils to grant authority for use of streets by gas, etc., plants, many gas plants had, under city ordinances purporting to grant such authority, been built, and millions of dollars invested in plants and mains, in Iowa cities, it may well be held that the Iowa statutes relating to legislative delegation of power to cities have received such legislative and judicial construction as to justify the declaration that such city councils had, prior to 1888, power to grant franchises to gas and electric light companies to use the streets in the construction and operation

of such plants. This finding renders unnecessary any consideration of the point (urged by counsel for plaintiff, but on which the authorities differ) that such an ordinance could be sustained under the statutes relating to the police powers of the cities.

I do not deem it necessary, at the present hearing of application for temporary injunction, to determine whether the franchise granted plaintiff in Ordinance No. 129 is "permanent and perpetual," as expressed therein. This point may well be reserved until its decision becomes material to the case. But counsel for defendants insist that the ordinance is void, as being beyond the power of the city council, because it purports to be a perpetual and permanent grant. The ordinance does not purport to convey an exclusive franchise. The council may, without violation of the terms of the ordinance, grant like authority to as many other electric light plants as it may desire. It is not vulnerable, therefore, to the arguments so forcibly presented, in the numerous authorities cited, against the validity of ordinances wherein the grant is declared by its terms to be exclusive. Assuming, but not deciding, that the city council had no authority to grant a "permanent and perpetual" franchise, as in Ordinance No. 129 attempted, is the ordinance invalid because it contains a section wherein such grant is declared perpetual? No attempt is made in said ordinance to enter into perpetual contract with the city for lighting its streets, etc. It may be assumed that such contract would be invalid. The ordinance, as to time limit, only declares that Vaughn and assigns shall have "permanent and perpetual" right to use the streets of the city so far as necessary and proper for construction and operation of its plant. No constitutional or statutory provision of this State bearing on the point under consideration is called to our notice. No decision of the Supreme Court of Iowa is cited as directly in point. The validity or invalidity of the ordinance as to this point

is largely, if not entirely, a matter of local law. We may, perhaps, derive assistance from some of the cases cited. In *Des Moines Gas Co. v. City of Des Moines*, 44 Iowa, 505, the court expressly decline to determine whether, as claimed by defendant's counsel, the ordinance granting franchise to the gas company was void because of the exclusive privilege therein granted. In *Des Moines St. R. Co. v. Des Moines B. G. St. Ry. Co.*, 73 Iowa, 513, the court had under consideration an ordinance wherein, having granted authority to plaintiff to lay its tracks in the streets, etc., the ordinance further provided, "The right herein granted to said company shall be exclusive for thirty years," which provision the court declare (page 517), is the same as if it read, "The right herein granted to said company to operate said railway shall be exclusive of other street railways," etc. Having considered the impossibility of foreseeing the future growth and wants of a city, and of predicting the same with reasonable approximation, except for a limited time, the court declare (page 520):

"From this we are inclined to think it follows that an ordinance providing for an exclusive right in perpetuity, however necessary it might be to contract for the service involved in the exercise of the right, would be unreasonable, and might be declared void."

The conclusion reached by the court is announced (page 521):

"Our holding is that under our statute, which empowers cities to authorize or forbid the laying down of a street railway track, a city council may make a reasonable provision by contract for present and future street railway service, and may secure the company contracted with against the impairment of its profits for a limited time, if a larger and better or more immediate service can be thus obtained."

Grant v. City of Davenport, 36 Iowa, 396, was a case wherein certain taxpayers of said city sought to restrain the city from carrying into effect a city ordinance which, among other provisions, purported to give a water company the exclusive right for 25 years, and thereafter an equal right with all others, of supplying the citizens of said city with water. There appears no limitation as to time. With reference to the objection urged against the validity of the ordinance, that it granted exclusive rights, the court declare (page 406):

"If any other person or company shall hereafter claim the right to lay down water pipes in the streets, he or it may then contest the validity of the exclusive privilege to do so, granted by the ordinance to this water company. Until such a controversy arises, it is neither necessary nor proper for us to decide it."

Dodge v. City of Council Bluffs, 57 Iowa, 560, was heard on demurrer to the bill. Plaintiffs were taxpayers of said city, and sought to restrain the city from carrying into effect an ordinance which was claimed to be void because, among other reasons, it granted "the exclusive privilege of laying pipes under the streets and alleys of the city, and of supplying the city and its inhabitants with water for fire protection, for manufacturing purposes and domestic use," to a water company, and bound the city for payment of money as water rental. It will be noticed that this ordinance purports to grant an exclusive right without limitation as to time. With reference to the claim that the ordinance was void because granting exclusive rights, the court say (page 566).

"The ordinance purports to grant an exclusive right. Whether it was competent for the city to grant such right, we need not determine. If we should conclude it was not, it is manifest that the ordinance would not be void. It would result merely that the right granted is not exclu-

sive, and plaintiffs, as mere taxpayers, cannot raise that question."

In *City of Waterloo v. Waterloo Street Ry. Co.*, 71 Iowa, 193, the ordinance granted the railway company the exclusive right for 30 years to lay its tracks over the streets of the city. After defendant had begun the operation of its railway, it began to lay its track in Jefferson street, whereupon the city council passed an ordinance repealing the original ordinance, and regranting, by ordinance, the right to defendant for its railway on the streets already occupied by it. The city now sought to enjoin the railway from continuing to lay its track in Jefferson street. The court say (page 195):

"Counsel contend, however, that the grant was invalid, for the reason that the city had no power to give the defendants an exclusive privilege to use the street. But, if these premises were conceded, it would follow only that the city, notwithstanding the grant to defendant, might lawfully confer the same privileges upon others, and not that the grant of the privilege to it did not confer upon it the right to use the street for the purpose intended."

The general rule applicable to statutes and ordinances is not disputed, to the effect that if a part thereof is void the remainder is void if such remainder is so connected with the void part as not to be capable of separation therefrom, and of standing by itself as valid. As was said in *Santo v. State*, 2 Iowa, 165, 205:

"An act void in part is not necessarily void for the whole. If sufficient remains to effect its object, without the aid of the invalid portion, the latter only shall be rejected, and the former shall stand."

In the same case Chief Justice Wright, in his dissenting opinion, says (page 224) with reference to constitutional provisions being upheld where a part of the statute is declared unconstitutional:

"But not so where the void provisions are vital to the execution of such as are unconstitutional."

Cooley, Const. Lim. (4th ed.) 215, quoted approvingly in *Drady v. Railway Co.*, 57 Iowa, 393, 407, states:

"Where a part of a statute is unconstitutional, that fact does not authorize the courts to declare the remainder void also, unless all the provisions are connected in subject matter, depending on each other, operating together for the same purpose, or otherwise so connected together in meaning that it cannot be presumed the Legislature would have passed the one without the other. The constitutional and unconstitutional provisions may be even contained in the same section, and yet be perfectly distinct and separable, so that the first may stand, though the last fall."

In *Poindexter v. Greenhow*, 114 U. S. 270, 304, the court announce that:

"It is undoubtedly true that there may be cases where one part of a statute may be enforced as constitutional, and another declared inoperative and void because unconstitutional; but these are cases where the parts are so distinctly separable that each can stand alone and where the court is able to see and declare that the intention of the Legislature was that the part pronounced valid should be enforceable, even though the other part should fall."

In *Presser v. Illinois*, 116 U. S. 252, 263, the court say:

"For it is a settled rule 'that statutes that are constitutional in part only will be upheld so far as they are not in conflict with the Constitution, provided the allowed and prohibited parts are separable.' "

And see *Unity v. Burrage*, 103 U. S. 457.

If that section of Ordinance No. 129 which declares the authority therein granted is "permanent and perpetual" be held void, yet the remainder of the ordinance is not thereby rendered invalid.

The further objection is urged by counsel for the defendants that the ordinance does not purport to grant to Vaughn and his assigns the use of the streets for public purposes, and that the city council is without power to authorize a continuing use of the streets for private purposes. There can be no difference of opinion as to the latter branch of the objection, under the holdings of the Supreme Court of Iowa. *Heath v. Railway Co.*, 61 Iowa 11, 18. But the ordinance in question does not expressly purport to grant authority to use the streets of the city for mere private purposes. While the cases are not uniform in their holdings, the great weight of authority seems to sustain the position that the furnishing of light to citizens generally is a sufficient public use to sustain the grant of the right to use the streets for operation of the plant furnishing such light. It is, however, contended by defendants that we are restricted to the ordinance itself, in determining whether the grant therein is for public or private use, and that since the bill discloses that at the passage of the ordinance the city was lighted under contract then in force with another electric light company, so that thereby such public use under ordinance is negatived, the silence of the ordinance as to public lighting, under the strict construction applicable thereto, compels the holding that the grant therein is for private use, and the grant therefore invalid. I must decline to accept this reasoning. *Prima facie*, a court must accept a statute or ordinance as properly enacted and authorized. If the ordinance is capable of two constructions, one of which upholds while the other overthrows its validity, the court must accept that which upholds. At least that much is due from the judicial to the legislative branch, be the latter the State or city legislative body. So here. If the ordinance itself does not disclose whether the use of the streets is for public or private purposes, and if the use therein granted may be for either of these purposes, the

ordinance being valid in the one case and invalid in the other, the court may not assume that the council did what it had no authority to do, and enacted a void ordinance. The court will assume the contrary. In so doing, and awaiting evidence as to the fact of such use, the court is not violating any rule of evidence which forbids the receipt of oral testimony to alter or modify a written contract. The bill avers that the electric light company is supplying the citizens with lighting, and that within a year from the passage of said ordinance, and continuously since it has been thus engaged. The poles and wires of the electric light company may be for public use, even though not transmitting electricity for lighting of the streets and public places of the city, but merely for lighting houses and stores of the citizens. In *City of St. Louis v. W. U. Tel. Co.*, 149 U. S. 465, 471, the Supreme Court cite approvingly the decisions holding that the use of the streets for telephone poles is not a private use, and declare that "telegraph poles stand on the same footing." Not deciding this point, however, as to the use of the streets by the electric light company under said ordinance, I leave this question for consideration in the further progress of this case.

Counsel for defendant contend that Ordinance No. 129 is repealed by the subsequent Ordinance No. 211. If the former ordinance granted permission only—a mere license—to use the streets, the right of the city to repeal the ordinance must be sustained, under the holdings of the Supreme Court of Iowa. *City of Burlington v. Burlington St. Ry. Co.*, 49 Iowa, 144; *Emerson v. Babcock*, 66 Iowa, 258; *Town of Spencer v. Andrew*, 82 Iowa, 14. Whether such right, when it exists, can be exercised in the manner attempted by Ordinance No. 211, it is not necessary now to determine. This last-named ordinance announces no reasons for such repeal, and no good reasons are shown why such repeal, effecting

such serious injury to, and substantially destroying, plaintiff's security, is necessary or proper. The controlling motives which caused its enactment are only left to be inferred from the allegations of the bill. We may not deny to the city whatever supervision and control belong to it in the complete and legitimate exercise of its police powers. It is not necessary at this time to attempt to define the extent of such supervision and control. But the words of the Supreme Court of Iowa in *City of Burlington v. Burlington St. Ry. Co.*, *supra*, are pertinent to the case, as thus far presented: "This police authority is not a despotic power that may be exercised without a sufficient public purpose." Having arrived at the conclusion that the city had the power to grant the authority conferred in Ordinance No. 129 to use its streets, this necessitates the holding that such ordinance granted more than a mere license for said use.

It will be noticed that the city inserted in Ordinance No. 129 no reservation or right to change or repeal that ordinance. And counsel cite us to no constitutional or statutory provision authorizing the city council thus materially to change or repeal such ordinance, where the ordinance has not reserved to the city such right, while the cases in Iowa and elsewhere are numerous which declare the rule to be adverse to the power of the city to thus materially change or modify in the absence of any such reserved right.

That the General Assembly of Iowa have the right to amend, abridge or repeal the franchise granted in Ordinance No. 129, under the sweeping provisions of section 1090, Code Iowa, is conceded by counsel for the plaintiff. But that body has not exercised that right, nor attempted, if such were possible, the delegation of that right to the defendant city. Whether even the legislative branch of the State could so abridge or repeal such franchise as seriously to impair or destroy the security held by plaintiff need not now be considered. Having arrived at the con-

clusion that said Ordinance No. 129 conferred a valid franchise, I find it unnecessary to determine whether what is claimed to be subsequent ratification by the city could have any effect in validating such ordinance, if originally invalid.

The importance of the questions submitted has seemed to justify this lengthy consideration given them. The conclusions reached readily affect numerous franchises in Iowa whose investments reach into millions of dollars. I greatly regret that the necessity for speedy determination of the pending application, and the press of other official duties, have prevented a clearer and more satisfactory presentation of the reasons impelling me to the conclusions reached. Counsel upon either side have favored the court, in oral argument and briefs, with a full and able presentation of reasoning and authority. All the cases cited have been examined. The present hearing is simply to determine whether there exists such necessity as to induce and justify the restraining powers of this court pending the hearing of the case. On the one hand, no substantial injury can be done to the defendant city or its citizens if attempted enforcement of the repealing ordinance be stayed during such hearing, while, on the other hand, if the repealing ordinance be enforced, and the poles and wires of the defendant electric company be removed from its streets by the city, as by said ordinance directed, not only will the business of such company be most seriously interrupted pending such hearing, and plaintiff's security disastrously affected, but if the final decree be for plaintiff herein, such decree would find such irreparable injury to have occurred to the electric plant as that, in effect, the decree would become inoperative. Under the circumstances, had my mind arrived with less positiveness—even with some hesitation—at the general conclusion reached, the circumstances might have induced me to grant the temporary injunction. Let a temporary writ of injunction

issue as prayed in petition, upon plaintiff filing due bond, in the penal sum of \$2,000, with sureties to the approval of the clerk of this court. To all of which the defendants severally except.

NOTE.—See note to *Grand Av. Ry. Co. v. People's Ry. Co.*, *post*.

THE VILLAGE OF HEMPSTEAD, Respondent, v. BALL ELECTRIC LIGHT COMPANY, Appellant.

N. Y. Supreme Court, Appellate Division, Second Dept., October, 1896.

(9 App. Div. 48.)

ELECTRIC LIGHT FIXTURES OBSTRUCTING HIGHWAY—POWER OF MUNICIPAL AUTHORITIES.

A corporation which has availed itself of municipal permission to place and operate an electric light plant in a highway, upon its express agreement to furnish light to the municipality, cannot lawfully insist on maintaining its structures after it has refused to perform its contract. Under such circumstances the disused fixtures are unlawful obstructions which it is the duty of the corporation to remove.

Under the Highway Law and the Village Law, an action to compel the removal of such unlawful obstructions may be maintained by the trustees of an incorporated village.

APPEAL from judgment of Supreme Court, Queens county, requiring the removal of all the defendant's poles, wires and electric lamps from the streets of the village of Hempstead.

Van Vechten & Delavan, for appellant.

Weller & Davidson, for respondent.

WILLARD BARTLETT, J.: The purpose of this action was to procure the removal from the streets of the village of Hempstead of certain poles, wires and lamps placed therein by the defendant, in order to furnish electric light to the

village. By the terms of a contract made in August, 1892, between the parties to this action, the Ball Electric Light Company undertook to erect in the village an electric light plant and furnish certain arc and incandescent lights without unnecessary interruption for five years from October 15, 1892, for which it was to receive a stipulated compensation. The village was lighted, under this agreement, up to the end of July, 1894, when the defendant ceased furnishing lights, on the ground that the paper already mentioned, purporting to be a contract, was absolutely null and void. Since that time, the poles, wires and lamps of the defendant in the village streets have been wholly disused for illuminating purposes, and the defendant, although duly requested so to do, has neglected to remove them. The present action was instituted by the trustees of the village, in its name, to compel their removal on the ground that they constitute an unlawful obstruction in the highway, amounting to a public nuisance. The plaintiff prevailed upon the trial at Special Term. The defendant, in asking this court to reverse the judgment, relies upon two main grounds: First. That the acts complained of do not constitute a nuisance, and, second, that an action to abate a nuisance cannot be maintained by this plaintiff, but if maintainable in equity at all, must be in a suit instituted upon the relation of the attorney-general or in the name of the People of the State.

The cases cited in behalf of the appellant in support of the proposition that the acts complained of do not constitute a nuisance, so far as they relate to telegraph poles or poles for electric lighting, apply only to such structures when placed in the public streets or highways by legislative authority, and when used for the purposes for which they were intended. They afford no sanction whatever to the idea that a corporation which has availed itself of the permission of the municipal authorities to occupy a portion of the highway with an electric lighting plant,

upon its express undertaking to furnish the municipality with light, can lawfully insist upon maintaining the structures which it has thus erected after it has absolutely refused to fulfil its contract and supply the light. We entertain no doubt whatever that under such circumstances the disused poles, wires and lamps constitute unlawful obstructions which it is the duty of the corporation to remove.

As to the second point, the respondent recognizes the authority of *Rozell v. Andrews* (103 N. Y. 151), and concedes that such an action as this could not have been maintained by the village trustees, in the name of the village, prior to the enactment of the Highway Law (Chap. 568, Laws of 1890). Section 15 of the Highway Law provides as follows:

Commissioners of highways may bring an action in the name of the town against any person or corporation to sustain the rights of the public in and to any highway in the town, and to enforce the performance of any duty enjoined upon any person or corporation in relation thereto, and to recover any damages sustained or suffered, or expenses incurred, by such town in consequence of any act or omission of any such person or corporation in violation of any law or contract in relation to such highway.

The Village Law (Chap. 291, Laws of 1870, title 7, sec. 1, as amended by Chap. 870, Laws of 1871) declares that

A village incorporated under this act shall constitute a separate highway district within its corporate limits exempt from the superintendence of any one except the board of trustees, who shall be commissioners of highways in and for such village, and shall have all the powers of commissioners of highways of towns in this State, subject to this act.

We think these two enactments, taken together, authorize the maintenance of an action by the trustees of an incorporated village to compel the removal of an unlawful obstruction on the highway which constitutes a nuisance. The grant of power to commissioners of highways, in section 15 of the Highway Law, is very broad, and, under

the provisions which we have quoted from the Village Law, the board of trustees are expressly declared to be commissioners of highways for the village, with all the powers of commissioners of highways of towns. The phrase "subject to this act," in the Village Law, does not seem to be a limitation which has any bearing upon this question.

As to the suggestion that the proper remedy is either by indictment or by an action instituted on the relation of the attorney-general in the name of the People, it is sufficient to quote what was said by MARVIN, J., in the case of *Griffith v. McCullum* (46 Barb. 561-569), referred to with approval by the Court of Appeals in *Lawton v. Steele* (119 N. Y. 226-238): "That which is exclusively a common or public nuisance cannot lawfully be abated by the private act of individuals. The remedy is an indictment, a criminal prosecution; *unless some other remedy has been provided by statute as in the case in some of our city and village acts of incorporation.*" Here some other remedy has been provided for by statute, as appears from the provisions of the Highway Law and the Village Law, to which reference has been made. (See 6 App. Div. 610.)

We may add that the right of the trustees of a village to maintain an equitable action, to restrain unlawful interference with a village highway, has already been upheld by this court in the case of *The Town of North Hempstead v. Gallagher*, in which the judgment was affirmed without an opinion at the June term. (See 6 App. Div. 610.)

The judgment of the Special Term should be affirmed, with costs.

All concurred.

Judgment affirmed, with costs.

NOTE.—See note to *Grand Av. Ry. Co. v. People's Ry. Co.*, *post*.

STATE (CAPE MAY, DELAWARE BAY & SEWELL'S POINT R.
CO., PROS.) v. CITY OF CAPE MAY ET AL.*New Jersey Supreme Court, November 5, 1896.*

ELECTRIC STREET RAILWAY—MUNICIPAL CONTROL.

(Head-note by the court):

It is within the authority of a city, under its police power, to regulate the use of the public streets, to enact an ordinance limiting the rate of speed at which electric trolley cars of a street railway for the carriage of passengers may be operated in such streets.

The ordinance will not be satisfied unless it be an unreasonable interference with the franchise or privilege conferred upon the street railway.

CERTIORARI to review an ordinance.

E. A. Armstrong, for prosecutor.

D. J. Pancoast, for defendants.

LIPPINCOTT, J.: At a meeting of the city council of the city of Cape May, held on July 9, 1895, the following ordinance was adopted, to wit:

An ordinance regulating the speed of passenger cars, operated by trolley or electric power, in the streets of the city of Cape May.

Section 1. Be it ordained and enacted by the inhabitants of the city of Cape May, in council assembled, and it is hereby enacted by the authority of the same, that hereafter all passenger cars operated by trolley or electric power within the limits of the city of Cape May shall not run at a speed greater than six miles per hour within said city limits.

Sec. 2. And it is further ordained and enacted by the authority aforesaid, that every person or corporation offending against the provisions of said ordinance shall be subject to and be liable to pay a penalty of thirty dollars for each and every violation of the same.

Sec. 3. And be it further ordained and enacted that this ordinance shall take effect immediately.

The writ of *certiorari* in this case is sued out to review the legality of this ordinance. For the statutes under which the prosecutor was organized as a corporation,

reference may be made to the case of *Cape May, D. B. & S. P. R. Co. v. City of Cape May* (N. J. Sup.), 34 Atl. 397. It is operating in the streets of the city of Cape May as an electric street railway. This ordinance, so far as the procedure of the city council of the city of Cape May is concerned, was passed in the manner prescribed by the charter of the city. The only reason of *certiorari* worthy of serious consideration is that the city council is without legal power to pass an ordinance of this character, affecting the prosecutor, which is a trolley or electric street railway constructed and operated in the streets of that city; or, in other words, it is not within the power of the city to regulate, by ordinance, the speed at which cars may be run through the streets of that city.

The charter of the city of Cape May (Pub. Laws 1875, p. 206, secs. 19, 20) authorizes the city council to pass ordinances

To regulate the streets and prescribe the manner in which corporations and persons shall exercise any privilege granted to them in the use of the same; to prevent immoderate driving or riding in the streets; and to regulate the running of locomotive engines and railroad cars therein; also to provide by ordinance for the protection of persons and property.

Section 44 of an act for the incorporation of street railway companies, and to regulate the same, approved April 6, 1886 (Gen. St. p. 3219) provides that the board of aldermen, common council or township committee, may, from time to time, establish such reasonable regulations as to the rate of speed and mode of the use of the track as the interest and convenience of the public may require, and enforce the same by lawful penalties. I think that, under the statutes, there can be no question of the power of the city council to pass the ordinance in question. It is the exercise of a police power, if without express authority of the charter of the city, yet it can be implied from the power in the public interest to regulate the use of the streets of the city. In the case of *Consolidated Tract.*

Co. v. City of Elizabeth (N. J. Sup.), 34 Atl. 146, Mr. Justice DEPUE declares the general principle to be that "the power of a municipality by ordinance to make reasonable regulations controlling the operation of street railway companies within the city is undoubted. The franchise granted to these companies to use the streets of the city for railroad purposes affords no immunity from any police control to which a citizen would be subjected. In this case the limitation of the exercise of this police power is discussed. See, also, *Trenton Horse Ry. Co. v. Inhabitants of City of Trenton*, 53 N. J. Law, 132; *North Hudson Co. R. Co. v. Mayor, etc., of City of Hoboken*, 41 N. J. Law, 71; *Booth St. Ry. Law*, secs. 223, 239; *Halsey v. City of Newark*, 54 N. J. Law, 102. The ordinance in question does not unreasonably interfere with the franchises conferred on street railway companies by the Legislature. *Allen v. Jersey City*, 53 N. J. Law, 522; *Dry Dock, E. B. & B. R. Co. v. Mayor, etc., of City of New York*, 47 Hun, 221. It being within the power of the city council to regulate their speed in the street, it must be found, in order that the ordinance be set aside, that it was unreasonable, or that it unreasonably interfered with the franchise of the company and the privileges granted it by the city. *Railway Co. v. Steen*, 42 Ark. 321; *Booth St. Ry. Law*, sec. 229. The rate of speed fixed by this ordinance would appear to be reasonable and ordinarily considered as one necessary for the fair protection of public travel in the public streets. There appears to be no evidence in the case to show that it is not so considered. The conclusion is that the ordinance is within the exercise of the police power of the city. This ordinance is legislative in its character, and reasonable in its purpose and effect. The proceedings of the city council in its adoption and the ordinance adopted must be affirmed, with costs.

NOTE.—See note to *Grand Av. Ry. Co. v. People's Ry. Co.*, *post*.

CAPE MAY, DELAWARE BAY & SEWELL'S POINT R. CO. v.
CITY OF CAPE MAY ET AL.

New Jersey Supreme Court, November 5, 1896.

MUNICIPAL CONTROL OF ELECTRIC CARS.

(Head-note by the court):

A city having authority under its charter to regulate the use of the public streets and highways, can enact an ordinance to compel passenger cars operated by trolley or electric power to come to a full stop before crossing intersecting streets; and such an ordinance, if enacted in the manner prescribed by the charter of the city, is legislative in its character, and will not be set aside as unreasonable in its purpose or effect.

CERTIORARI to test the validity of an ordinance.

E. A. Armstrong, for prosecutor.

E. J. Pancoast, for defendants.

LIPPINCOTT, J.: This writ was sued out to test the validity of an ordinance of the city of Cape May, entitled "An ordinance regulating the operation of passenger cars, operated by trolley or electric power at streets and other crossings in the city of Cape May." This ordinance was adopted July 9, 1895. It provides in its first section as follows:

Be it ordained and enacted by the inhabitants of the city of Cape May, in city council assembled, and it is hereby enacted by the authority of the same: That all passenger cars operated by trolley or electric power shall come to a full stop at each and every street before crossing the same, and also at each and every opening for foot passengers through the board walk on Beach avenue opposite to any street running down to Beach avenue, before passing the same, also before crossing the Beach walk and Beach drive at any place.

The second section provides a penalty for violations of the ordinance, and the third section ordains that it shall

take effect immediately. The charter of the city of Cape May authorizes the city council to pass ordinances to regulate the streets of the city and to provide for the manner in which corporations and persons shall exercise any privilege granted to them in the use of the same, to prevent immoderate driving or riding in the streets, and to regulate the running of locomotive engines and railroad cars therein, and also such ordinances as they may deem necessary and proper for the good government, order and the protection of property and persons. P. L. 1875, p. 206, secs. 19, 20. The council of the city of Cape May has heretofore, by ordinance, granted this company the use of the streets for its electric cars (*Cape May, D. B. & S. P. R. Co. v. City of Cape May* [N. J. Sup.], 34 Atl. Rep. 397), and it was, at the time of the adoption of the ordinance under review, in full operation as an electric street railway. It is conceded that the crossings upon which this ordinance is intended to have effect are the crossings of public streets and public places devoted to all the uses of public travel in the city. An examination of the returns to the writ clearly reveals that the ordinance was passed by the city council according to the manner and procedure prescribed by the provisions of the city charter; and, while there are several reasons directed against the validity of the ordinance on this ground, they merit no consideration.

The other reasons for reversal are that the ordinance is not legislative in its character, and passed without notice to the prosecutor, and that it is not within the powers delegated to the city council, and also is unreasonable. It will be noticed that the city council is clothed with power to regulate the streets by ordinance, and also to provide, by ordinance, the manner in which corporations or persons shall exercise any privilege granted them in the use of the same, to prevent immoderate riding or driving therein, to regulate the running of locomotives and rail-

road cars therein, and by ordinance, so far as may be necessary, provide for the good government, order and the protection of property and persons. P. L. 1875, p. 206, secs. 19, 20. The power, therefore, is undoubted to make reasonable regulations to reasonably control the operation of electric street railway cars, within the city, in many respects. *Trenton Horse R. Co. v. Inhabitants of City of Trenton*, 53 N. J. Law, 132. The power to reasonably regulate the operation of these street railways is implied from the authority conferred upon the city council by the city charter. The franchise or privilege is granted by the municipality, and a reasonable regulation of the enjoyment of the franchise is not a denial of the right; for corporations, which are to be regarded as inhabitants of a city, are subject to its ordinances to the same extent as natural persons. The power is a police power, and one which is constantly exercised in prescribing regulations for the good of the community, and such regulations can be enacted by the legislative body of the municipality without notice to the parties who may claim to be interested, providing the regulations are made according to, and in the manner prescribed by, the charter of such municipality. The exercise of this power is legislative in its character. *Id.*; *Consolidated Tract. Co. v. City of Elizabeth* (N. J. Sup.), 34 Atl. Rep. 146; *Frankford & P. Pass. Ry. Co. v. City of Philadelphia*, 58 Pa. St. 119; *North Hudson Ry. Co. v. Mayor, etc., of City of Hoboken*, 41 N. J. Law, 71; *Booth St. Ry. Law*, sec. 222. Ordinances passed by virtue of an implied power conferred upon municipal corporations must be reasonably consonant with the general powers and purposes of the corporation, and not inconsistent with the laws or policy of the State. 1 Dill. Mun. Corp. (4th ed.) sec. 319. There is much discretion left to the municipal corporations in the exercise of their general and implied powers, and the exercise of this authority will not be judicially interfered with unless its exercise has been

manifestly unreasonable and oppressive, and is an invasion of private rights. No private right is invaded by the ordinance in question, and the presumption is in favor of its validity. The unreasonableness of the ordinance is not apparent on its face, and the burden of proof is on the prosecutor to show wherein it is arbitrary, unjust or oppressive. Booth St. Ry. Law, sec. 224, and cases cited in notes. Regulations may be made requiring street railway cars to stop at designated places in order to accommodate passengers and prevent unnecessary obstructions to public travel, as well as to avoid danger of accidents to others in the ordinary use of the streets and other public places. *Railroad Co. v. Calderwood* (Ala.), 7 South. Rep. 360. Street railways are a great public convenience, and they are to be properly protected in the exercise of their franchise; but they are not entitled to a monopoly of the street, nor even to the exclusive use of that part covered by their tracks. They must exercise their rights in harmony with the rights of the traveling public. The ordinance in question is presumed to be a valid ordinance. It does not appear on its face to be unreasonable or oppressive under the circumstances of the case. Neither does it otherwise appear in purpose or effect to be unreasonable. Electric street railways can be propelled at a very rapid rate of speed along the streets and over the crossings and intersections thereof, and other public places, with great danger to those using such crossings. In view of these dangers, incident to the operation of this class of street railways, it is incumbent upon the companies owning and operating them to exercise a degree of care and caution to avoid accidents commensurate with the risks involved. This degree of care is a reasonable one in view of the probabilities of danger, and the exercise of this care for the protection of the general traveling public can be enforced by ordinance. A regulation that the cars shall stop at every street before crossing is a reasonable one,

which does not interfere with the franchise of the prosecutor, and would appear to be necessary to protect the public from the dangers incident to the crossing. The proceedings of the city council and the ordinance must be affirmed, with costs.

NOTE.—See note to *Grand Av. Ry. Co. v. People's Ry. Co.*, *post*.

STATE (CAPE MAY, DELAWARE BAY & SEWELL'S POINT RAILROAD COMPANY, PROS.) v. CITY OF CAPE MAY ET AL.

New Jersey Supreme Court, November 5, 1896.

ELECTRIC STREET RAILWAY—MUNICIPAL CONTROL.

(Head-note by the court):

A city council, under the charter of the city, which confers power upon the council to make ordinances to regulate the public streets, to prevent immoderate driving or riding, to provide the manner in which corporations or persons shall exercise any privilege granted to them in the use of the streets, to regulate the running of locomotive engines and railroad cars therein, and to protect persons and property, is authorized to enact an ordinance that all passenger cars operated by trolley or electric power in the streets of the city shall have proper and suitable fenders on the front of such cars to prevent accident, and that it shall be unlawful to operate such cars in the streets of the city without such fenders.

Cases of this series cited in opinion, appearing in bold faced type: *State, Kennelly, Pros. v. Jersey City*, vol. 5, p. 146; *Clements v. Louisiana Elec. L. Co.*, vol. 4, p. 381; *State ex rel. Wisconsin Teleph. Co. v. Janesville St. Ry. Co.*, vol. 4, p. 239.

CERTIORARI to review an ordinance.

E. A. Armstrong, for prosecutor.

D. J. Pancoast, for defendants.

LIPPINCOTT, J.: On the 9th day of July, 1895, the city
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council of the city of Cape May passed the following ordinance, to wit:

An ordinance requiring the use of fenders on all passenger cars operated by trolley or electric power in the streets of the city of Cape May.

Section 1. Be it ordained and enacted by the inhabitants of the city of Cape May, in city council assembled, and it is hereby enacted by the authority of the city, that hereafter all passenger cars operated by trolley or electric power in the streets of the city of Cape May shall have proper and suitable fenders on the front of said cars to prevent accidents, and that it shall be unlawful to operate street cars within the city without such fenders.

Section 2 provides a penalty for a violation of this ordinance, and section 3 provides that it shall take effect immediately. This *certiorari* has been brought to review this ordinance.

The ordinance in this case was passed by the council in the manner prescribed by the city charter. The city charter of the city of Cape May authorizes the city council thereof to enact ordinances to regulate the streets of the city, to provide for the manner in which corporations and persons shall exercise any privilege granted to them in the use of the same, to prevent immoderate driving or riding in the streets, to regulate the running of locomotive engines and railroad cars therein, and such ordinances as they may deem necessary for the good government, order and protection of persons and property. P. L. 1875, p. 206, sections 19, 20; Gen. St. p. 312.

The prosecutors are operating an electric street railway on the streets of the city of Cape May, under an ordinance granting it that privilege. *Cape May, &c., Co. v. City of Cape May* (N. J. Sup.), 34 Atl. Rep. 397.

It has been held at the present term of this court that ordinances passed by the city council, reasonably regulating the rate of speed at which the prosecutor shall run its cars through the streets, and also to compel it to make full stops before crossing intersecting streets, are valid regula-

tions in the exercise of the police powers implied from the authority granted by the charter of the city to the council. Such ordinances, being reasonable, will be sustained. It is difficult to conceive, in view of the statutory power conferred upon the city council, upon what ground this ordinance can be attacked, as the improper exercise of the power of the regulation of the use of the street for the protection of the traveling public. The franchise or privilege of the prosecutor to operate its cars in the streets of the city is founded upon the grant by the city. The reasonable control of this use of the streets of the city has not been divested by the ordinance under which the railway is operated. The grant was to use the streets with cars of the prosecutor propelled by electric power, a power capable of producing a high and dangerous rate of speed, from which collision would result, perhaps, in probable serious injury to others in the use of the streets. The law is well settled in this State that these street railways have no exclusive use of the streets, and not even the exclusive use of the tracks upon which the cars are operated. The legislative power to control and regulate the streets has been delegated to the governing body of the municipality, and it is under this power that the privilege has been conferred upon the prosecutor, and it is still within the power of the city council by invocation of this same legislative authority to so regulate the use of the streets as shall render their use by electric cars consistent with the safety of the general public from accident and injury. The ordinance can be tested only in view of the extraordinary propulsive power by which such cars are operated, and the danger arising from the high rate of speed which may be obtained, and other dangers incident to their operation in the streets; and reasonable regulations in the shape of ordinances to protect the ordinary public travel upon the highways have always been supported whenever questions as to the validity of such regulations have arisen. The

ordinance under review in matter of principle in no wise differs from ordinances regulating the rate of speed of the cars, or other ordinances owing their origin impliedly to the authority vested in the municipality to regulate the use of its streets. The legislature, when it authorized the use of the public streets for these purposes, was presumed to have intended that the grantee of the franchises should hold its privileges subject to such regulations as were reasonably necessary for the common use of the street for a street railway and for ordinary travel. *North Hudson Co. R. Co. v. Mayor, &c., of Hoboken*, 41 N. J. Law, 71; *Consolidated Traction Co. v. City of Elizabeth* (N. J. Sup.), 34 Atl. Rep. 146. Nearly all kinds of reasonable regulations can be imposed upon street railways in the use of the streets by the municipality, under the authority granted by the Legislature to pass ordinances to regulate the use of the streets, and such regulations are never declared unlawful on the ground that they impair the franchises of the companies. The power granted to municipal bodies to legislate, by ordinances, is a grant to a subordinate body, and its legislative acts, when counter to the acts of the State Legislature, must give way; but these companies nevertheless hold their franchises subject to such municipal regulations as do not unreasonably interfere with the exercise of the franchises conferred by the Legislature. The franchises are exercised upon a public highway, for the public benefit, which highway is acquired and improved for the benefit and advantage of the public at large. The position is different from that of a railroad company exercising its franchises upon a roadbed of its own. The grantee in the former case is subject to municipal regulations of a greater scope in the interest of the public at large than would be justifiable in the case of companies occupying and using their own road beds. *Consolidated Traction Co. v. City of Elizabeth* (N. J. Sup.), 34 Atl. Rep. 146; *Allen v. Jersey City*, 53 N. J. Law, 522;

Trenton Horse Ry. Co. v. City of Trenton, 53 N. J. Law, 132; Booth St. Ry. Law, secs. 223-230. Under this power, ordinances regulating the use of the streets by street railways have become frequent, especially so since the introduction of electricity as a motive power, with its capacity for a high rate of speed, as well as other dangerous and obstructive capacities. Their operation must be reasonably safe, reasonably consistent, and in harmony with the legal customary use of the street by the general public; and ordinances to enforce this rule of law are reasonable in purpose and effect. Even direct legislative authority to a street railway company to carry passengers over the streets of a city does not exempt the corporation from municipal or police control. The principle is a general one that when a business is authorized to be conducted by a corporation within a municipality the latter presumptively possesses the same right to regulate it that it has over like business conducted by private persons. A grant to a corporation of the right to own property and transact business affords no immunity from any police control to which the citizen could be subjected; and a reasonable regulation of the enjoyment of the franchise is not a denial of the right, nor an invasion of the franchise, or a deprivation of its property, or interference with the business of the corporation. The company is presumed to know that the business of operating a city street railway must be conducted under such reasonable rules and regulations as the municipality may impose, and subject to its share of the burdens incident to the conduct of the municipal government. Dill. Mun. Corp. (4th ed.), sec. 720; *Trenton Horse Ry. Co. v. City of Trenton*, 53 N. J. Law, 132, and cases cited; *Consolidated Traction Co. v. City of Elizabeth*, *supra*. Ordinances regulating speed, and directing where stops should be made, have been held reasonable (Dill. Mun. Corp., 4th ed., sec. 713; *Hanlon v. Railroad Co.*, 129 Mass. 310; Booth St. Ry. Law, sec. 229); to

compel the removal of earth falling on the track (*Pittsburgh & B. P. Ry. Co. v. Borough of Birmingham*, 51 Pa. St. 41); to compel a company to employ a conductor to assist the driver (*Trenton Horse Ry. Co. v. City of Trenton*, 53 N. J. Law, 132); to keep the street between rails in repair (*North Hudson Co. R. Co. v. Mayor, etc., of Hoboken*, 41 N. J. Law, 71); to pass such ordinances as may be necessary for the common use of streets for a street railway and ordinary travel (*Id.*). The city can require a greater degree of care on the part of the company in running its cars, as a consideration for granting the franchise, than may be required by law towards one in the ordinary use of the street. *Fath v. Tower Grove & L. Ry. Co.*, 105 Mo. 537. Ordinances to compel the cleaning and sprinkling of tracks have been frequent, and their validity sustained. Cars can be required to be run at certain hours, and at fixed intervals; and the corporation can be required to remove snow from the streets. *Broadway & S. A. R. Co. v. City of New York*, 49 Hun, 126. Ordinances have been upheld prohibiting the use of salt or saltpeter or salt of any character on the tracks. *Consolidated Traction Co. v. City of Elizabeth, supra.* The use of sand on the tracks can be prohibited by ordinance. *Dry Dock, E. B. & B. R. Co. v. Mayor, etc., of New York*, 47 Hun, 221. An ordinance has been held valid which prevented cars driven in the same direction from approaching within 300 feet of each other. *Bishop v. Railroad Co.*, 14 R. I. 214. The dangers created by the use of electricity as a propulsive power of street railways of necessity creates a new department of police regulations. The use of an agency so dangerous as electric power is a proper subject for the exercise of police control, for the purpose of obviating danger so imminent even in its most careful use. The ordinances which confer the right to construct electric railways in the public streets carefully guard the method of construction, whenever it is important for the protection

of public or private interests to do so. *Kennelly v. Jersey City*, 57 N. J. Law, 292. Such regulations may be contained in the grant of the privilege to use the street for the purposes of an electric street railway, as conditions annexed to the grant; but their absence there does not prevent the municipality from their subsequent enactment, if they be reasonable for the protection to the ordinary use to which the highway is lawfully devoted, and in the proper exercise of the general power of the State, conferred upon a subordinate political body, to protect the lives and property and promote the welfare of its citizens, and all other persons, natural or artificial who have the right to claim the protection, in these respects, of the law. The maxim "*Sic utere tuo ut alienum non laedas*," is quite applicable to a street railway operated by electric power in its use of the streets of a city; and ordinances enforcing the doctrine are not only valid, but salutary as an exercise of municipal regulation.

The construction of the road and its equipment would seem reasonably to be a subject of municipal control, when, as in this case, there is nothing in the legislative grant to construct and maintain the street railway, which forbids such control, and where, as in this case, the charter of the city confers power upon the city council by ordinance not only to regulate the use of the streets, but to prescribe the manner in which corporations and persons shall exercise any privilege in the use of the same, and empowers them to make and establish such ordinances as they may deem necessary and proper for good government, for the maintenance of order in the protection of persons and property. An ordinance requiring splices on electric lines to be insulated was declared a valid exercise of municipal control. *Clements v. Louisiana Electric Light Co.* (1892), 11 South. Rep. 51. An ordinance providing guard wires in the operation of an electric street railway, where several electric wires crossed each other at different

heights, was sustained as a reasonable exercise of the police power, under statutes conferring the right of regulation of the use of the streets. *State v. Janesville St. Ry. Co.* (1894), 57 N. W. Rep. 590. It must, at this day, be conceded that municipal authorities having the regulation of the use of streets have the power to pass all ordinances to reasonably guard and secure ordinary public safety and convenience, whether in relation to the construction of the road or its equipment. Ordinances to regulate street railways, when reasonable, are valid. *State v. Madison St. R. Co.*, 72 Wis. 612; *State v. Hilbert*, 72 Wis. 184. What can be more reasonable and necessary for the protection of the ordinary travel and use of a street than that an electric car, capable of being driven at a high rate of speed, should have attached guards of some kind or other against accident and injury. The test is whether it is reasonably designed to guard some public or private right from threatened injury from the operation of these cars. Tied. Lim. 597-599. Upon reason and authority, this ordinance is justified as an exercise of reasonable municipal or police power in behalf of the protection of the public engaged in ordinary business or travel upon the streets of the city. The precise kind of fender is not regulated by this ordinance, but it is neither uncertain nor unreasonable because of this. The term "fender" is well defined and readily understood as a guard and protection against danger, and it is left to the prosecutor using a reasonable discretion, and without trick or evasion, to supply a proper and reasonable device to satisfy the plain meaning of the ordinance. The object of the ordinance can be easily effectuated; nor is there anything in the ordinance to prevent the prosecutor, from time to time, from changing a fender once adopted to one more suitable and one more effectual in subserving the purpose of the ordinance. But a *bona fide* reasonable observance of this ordinance is required by reason of its being a legal exer-

cise of the power of municipal control, and it is not an invasion of the franchise of the prosecutor, nor an interference with the operation of its street railway or its business. It is a regulation at the same time reasonable, necessary, and salutary, and entirely within the power of municipal control, vested in the city council of the city, and the proceedings thereof in the adoption of this ordinance, and the ordinance also, must be affirmed, with costs.

NOTE.—See note to *Grand Av. Ry. Co. v. People's Ry. Co.*, *post*.

STATE EX REL. COLUMBIA ELECTRIC STREET RAILWAY,
LIGHT & POWER COMPANY V. W. MCB. SLOAN, MAYOR,
AND ANOTHER.

South Carolina Supreme Court, Nov. 25, 1896.

ELECTRIC STREET RAILWAY.—MUNICIPAL CONTROL.

Under a statute giving the municipal authorities of a city power to make all such ordinances relative to streets as they may think proper and necessary, *held*, that the authorities had power to require that electric street cars should not be run without conductors. This in view of the facts (1) that the company in question succeeded to the rights and duties of another company whose license to use the streets was given subject to amendment or alteration by the municipal authorities; and (2) that when applying for leave to change from horse to electric power, the company caused an ordinance to be drafted, which was enacted by the common council, declaring that the permission was given subject to the reserved right to regulate the manner of operating the railway.

APPEAL by defendant from order of Richmond County Common Pleas, Circuit Court, granting writ of prohibition. The following exceptions were taken by the defendants:

"The respondents above named except to the judgment and order of Judge TOWNSEND granting the writ of prohibi-

tion in the above-entitled proceeding, of date August 5, 1895, upon the following grounds: (1) Because his honor erred in ordering that the writ of prohibition do issue, and in holding that the city council of Columbia had no authority delegated to it by the Legislature of the State of South Carolina to regulate the petitioner's domestic affairs in such manner as it has undertaken to do by the ordinance in question. (2) Because his honor erred in not holding that the Legislature of the State of South Carolina had delegated authority to the city council of the city of Columbia to pass the ordinance making it unlawful for street cars to be run in the streets of the city of Columbia without a conductor, and to impose a fine of not more than forty dollars for a violation thereof. (3) Because his honor erred in not holding that the ordinance in question was a necessary and proper exercise of the police power of the city of Columbia, under the charter granted to said city by the Legislature of the State of South Carolina, to make 'All such ordinances, rules and regulations relative to the streets and markets of said city as they may think proper and necessary, and to establish such by-laws not inconsistent with the laws of the land as may tend to preserve the quiet, peace, safety and good order of the inhabitants thereof.' (4) Because his honor erred in not holding that the franchise granted to the petitioner to operate an electric street railway in the city of Columbia was subordinate to the right of the city, under its charter, to make reasonable rules and regulations for the operation of said electric street railway, and erred in not holding that the ordinance requiring a conductor as well as a motorman was a reasonable regulation. (5) Because his honor erred in not holding that the petitioner could, under its charter, construct or acquire an electric street railway through and upon the streets of the city of Columbia only with the consent of city council, and erred in not holding that the city council of Columbia, in giving its consent, had the right to attach

thereto any reasonable rules and regulations for the operation of said road, and had also the right, when giving its consent, to reserve the power, after the building of said road, to make such further rules and regulations for the operation thereof as in their judgment the public safety and welfare might demand, and erred in not holding that the ordinance making it unlawful for electric cars to be run without conductors in the streets of the city of Columbia was a regulation authorized to be made under the reservations which were attached to the city's consent for the occupation of its streets for the purposes of said electric road. (6) Because, if his honor's order was intended, or can be construed, as authorizing the writ of prohibition to restrain the enforcement of any part of the ordinance, other than so much thereof as makes it unlawful for electric cars to be run in the streets of the city of Columbia without conductors, then he further erred therein upon the grounds above mentioned, and also upon the further ground that the validity of the remainder of said ordinance was not at issue before him, and no question was made or raised at the hearing in regard thereto."

John P. Thomas, Jr., for appellants.

John T. Sloan and W. H. Lyles, for respondent.

GARY, J.: The petitioner herein made application to his honor, Judge D. A. TOWNSEND, for a writ of prohibition to restrain and prohibit the mayor and chief of police aforesaid from enforcing an ordinance of said city making it unlawful for the said company to operate its electric street cars upon the streets of Columbia unless the same were in the charge of conductors. The said ordinance provides that a violation thereof shall be punishable by a fine not exceeding \$40. After trial for a violation of said ordinance, the petitioner company was sentenced to pay a fine of \$10; hence the application for the writ of prohibition. The petitioner alleged, as grounds for the writ, that the ordinance aforesaid was *ultra vires*, null and void, and that the

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mayor did not have jurisdiction in the premises. The application was heard and decided by his honor, Judge TOWNSEND, upon the petition, answer of the mayor and chief of police, and exhibits set out in the case. His honor, Judge TOWNSEND, granted an order allowing the writ to be issued, from which order the mayor and chief of police have appealed to this court upon exceptions which will be set out in the report of the case.

There seems to be no dispute as to the facts, and the question is, therefore, one of law, to wit, whether the ordinance was *ultra vires*, and the mayor without jurisdiction to impose the fine. It is alleged in the answer, "that, in the judgment of the city council of the city of Columbia, the passage of the said ordinance was necessary for the safety and protection of the inhabitants of the city of Columbia; that the operation of electric cars in charge of motormen, without conductors, in the streets of the city of Columbia, is dangerous to the lives of its citizens; and that the ordinance in question is a necessary and proper exercise of the police power of the city of Columbia, and its enforcement is necessary for the safety of the inhabitants of the city, and for the proper regulation of traffic upon the streets of said city." It is contended that the Legislature conferred upon the city of Columbia power to make said ordinance by the act of 1871 (14 St. at Large, 569), section 10 of which provides:

. . . And the said mayor and aldermen shall have, and they are hereby vested with full and ample power from time to time, under their common seal, to make all such ordinances, rules and regulations relative to the streets and markets of said city as they may think proper and necessary, and to establish such by-laws not inconsistent with the laws of the land as may tend to preserve the quiet, peace, safety and good order of the inhabitants 'hereof; and the said mayor and aldermen, or the said mayor alone, may fine, and impose fines and penalties, for violations thereof, which may be recovered in a summary manner, to the extent of forty dollars, before them in council, or before him alone, subject to the right of appeal as hereinbefore provided. . . .

The Columbia Street Railway Company was, prior to

the 29th of June, 1886, organized under the provisions of an act of the Legislature incorporating it, approved 9th of February, 1882. Sections 5 and 6 of this act are as follows:

Section 5. That the said company shall have power to construct single or double railway tracks of such gauge as they may elect, through any street or streets of the city of Columbia as it may deem advisable for the accommodation of the public or the interest of the company, and to extend the same five miles beyond the corporate limits of the city; provided, that the said company shall so construct its railways that they shall not obstruct the streets through which they pass, and that the company shall be required, after laying said railways, to replace the portion of the streets over which they pass in good condition, and thereafter keep their railway in like good order; in consideration of which the said company shall have such exclusive right of way over said railway, as may be necessary for the proper conduct of its business.

Sec. 6. That said company shall have power to transport passengers and freight in suitable and sufficient carriages and cars at such rates as may be fixed in the by-laws of the same.

On the 8th of June, 1886, the Columbia Street Railway Company petitioned the city council of Columbia for leave to lay its tracks, etc., in certain streets of said city. On the 29th of June, 1886, an ordinance was passed entitled "An ordinance to authorize the Columbia Street Railway Company to lay their tracks along certain streets herein mentioned, to regulate the manner of the same, and to regulate the manner of operating said railway." Section 12 of this ordinance is as follows:

The corporate authorities reserve the right to amend or alter this ordinance whenever circumstances may require it, and the granting of the privilege to this company to construct its tracks through any street is not exclusive, and the said city authorities may grant the same right to other companies through the same streets or thoroughfares if they deem it advisable.

By an act of the Legislature approved 24th December, 1890, the Columbia Electric Street & Suburban Railway & Electric Power Company was incorporated. Section 5 of this act is as follows:

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That the said company shall have power to construct or acquire single or double railway tracks, of such guage as they may elect, with consent of city council, and to extend the same five miles into the country in any direction or directions they may wish from the state capitol. And the said company is authorized and empowered to contract for and provide electric motor power for any other purpose or purposes.

Section 6 of said act is as follows:

That the said company shall have power to operate their cars in the transportation of passengers and freight, over the tracks they may construct or acquire in said city, with electric power, in suitable carriages, and at such rates as may be fixed upon in the by-laws of the same.

The petitioner company was incorporated by an act of the Legislature approved 16th December, 1891, and, by authority of that act, acquired the rights and franchises of the two companies hereinbefore mentioned, subject to the liabilities and duties of said companies. On the 13th of September, 1892, the Columbia Electric Street Railway, Light & Power Company petitioned the city council for leave to operate its cars by electricity. In pursuance of said petition the city council on the 11th of October, 1892, passed an ordinance entitled "An ordinance to confer upon the Columbia Electric Street Railway, Light & Power Company the powers and privileges conferred upon the Columbia Street Railway Company by an ordinance ratified on the 29th day of June, 1886, and to enlarge the same." Section 3 of the last-mentioned ordinance is as follows, to wit:

And be it further ordained that the city council of Columbia, S. C., shall have the power and hereby reserves the right to regulate by ordinance the manner of operating such electric railway, and to alter and amend the ordinances relating thereto by such further enactment as in their judgment the public welfare may demand.

The exceptions will not be considered *seriatim*, as they raise substantially the single question whether the city council had the power and authority to make the ordin-

ance in question. It is not necessary to cite authorities to sustain the general proposition that street railways are subject to reasonable regulations by the authorities of the municipality where they are located under its police powers. In this case the question whether the ordinance is reasonable is not before the court for consideration. We will proceed to consider whether the city council had the power to make the regulation aforesaid, that street cars should not be run unless in charge of a conductor. Not only is there an absence of legislative intent to prevent the authorities of the city of Columbia from exercising its powers of police in regard to the street railways, but the trend of the various legislative enactments relative thereto, and hereinbefore mentioned, is to make the running of the street cars subject to rules and regulations prescribed by the city council. This police power of the city seems to have been recognized by the petitioner when it filed its petition with the city council asking permission to be allowed to make such changes in its line as were necessary to enable it to operate its cars by electricity, and with said petition presented the draft of an ordinance to accomplish that result, section 3 of which ordinance is hereinbefore set out. The authorities are not in harmony touching the abstract question whether municipal authorities have the right to make a regulation that the street cars shall not be operated unless in charge of a conductor. Whatever doubts may exist as to this abstract question, we are, nevertheless, of the opinion that the facts connected with the case show that the city council had the power to pass the ordinance in question, and that his honor, the circuit judge, was in error in deciding to the contrary. It is the judgment of this court that the order of the Circuit Court be reversed, and the petition dismissed.

NOTE.—See note to *Grand Av. Ry. Co. v. People's Ry. Co.*, post

STATE, EX. REL. ST. LOUIS UNDERGROUND SERVICE COMPANY V. WILLIAM J. MURPHY, Street Commissioner.

Missouri Supreme Court, June 25, 1895.

SUBWAYS FOR ELECTRIC WIRES.—ULTRA VIRES FRANCHISE.

The city of St. Louis, empowered by its charter to regulate the use of streets, granted by ordinance to a corporation formed for the purpose of constructing and operating electrical subways, the right to construct and maintain such subways in any of its streets for the period of fifty years. It prescribed the manner and depth at which conduits and pipes should be laid in streets; declared the grantee to be a common carrier, and required prepayment of \$500 semi-annually to the city for the rights and franchises granted. The original ordinance required the company to permit the use of the subways by any persons or companies desiring to use them, upon terms to be agreed upon; also required the company to maintain wires for the city fire and police alarm and telephone service, free of charge. These provisions were cancelled by amendment. After subways had been constructed in some of the streets and payment made by the company as prescribed by the ordinance, an application to construct further subways was refused, and application for mandamus made to compel the granting of the permit.

The application was denied upon the ground that the ordinance contemplated the use of public property for private purposes, which was beyond the power of the city to grant.

Held, also, that while by permitting the company to expend money and by receiving the stipulated payment, the city would have been estopped had the ordinance been within its charter powers, the principle of *ultra vires* prevented the application of the principle of estoppel.

Also *held*, incidentally, that the city authorities had the power to authorize, and, if public safety and general welfare should demand it, to require all electric wires, used for the benefit of the public, to be laid underground; this, as a proper and legitimate regulation of the public use of the streets.

Cases of this series cited in opinion, appearing in bold faced type: *St. Louis v. W. U. Tel. Co.*, vol. 4, p. 115; *Julia Building Ass'n v. Bell Teleph. Co.*, vol. 1, p. 801; *St. Louis v. Bell Teleph. Co.*, vol. 2, p. 44.

APPLICATION for mandamus. Facts stated in opinion.

John G. Chandler, R. L. McLaran, and E. A. Noonan, for relator.

D. D. Fisher and E. C. Kehr, for respondent.

MACFARLANE, J.: On the 15th day of February, 1889, an ordinance of the city of St. Louis, No. 14,798, entitled "An ordinance to provide for laying electric wires underground," was passed and approved. By section 1 permission and authority were granted the National Subway Company of Missouri, its successors and assigns, to construct, maintain and operate conduits, pipes, mains, conductors, manholes and service and supply pipes in any of the streets, alleys, squares, avenues and public highways of the city of St. Louis, for the term of 35 consecutive years. The objects are declared to be that of "distributing and maintaining line or lines of electric and other wires, together with all necessary feeders, outlets, service wires or other electrical conductors to be used for the transmission of electricity for any and all purposes." It was further provided that, before said company, its successors or assigns, should lay any conduits or pipes in any of the streets, it should submit to the board of public improvements its plans, and the same should be approved. Section 2 prescribed the manner and depth in which conduits and pipes should be laid in the streets. Section 3 required the work to be done with the least possible injury or delay to the public, and that the streets be left in proper condition. Section 4 required the deposit of \$1,000, to secure the proper repair of streets, and imposed a penalty for neglect to repair. Section 5, the corporation is declared to be a common carrier, and is required to permit any person or persons, company or companies, to use said system of underground conduits upon terms agreed upon by the respective parties, and in case of a failure to agree, arbitra-

tion was provided for. Section 6 requires the corporation to furnish, in addition to other taxes assessed by law, and maintain at its own expense, all the wires of the fire and police alarm and telephone service of the city of St. Louis, free of charge to the city. Section 7 makes the corporation subject to ordinances of the city now in force, or that may hereafter be passed, in relation to making excavations in streets. Section 8 nullified the ordinance unless a bond for \$25,000, with approved security, should be filed in 90 days, conditioned for the faithful observance of the ordinance. The ordinance was also made null, unless work was commenced in 60 days. Section 8 declares a forfeiture for violation of the conditions and provisions of the ordinance. Section 10 gives the city the right to purchase the property at the end of the term granted.

On February 6, 1891, Ordinance No. 15,953 was passed, entitled "An ordinance amendatory of Ordinance No. 14,798 of the city of St. Louis, entitled 'An ordinance to provide for laying electric wires underground.'" This ordinance strikes out sections 6 and 10 of Ordinance 14,798, and substitutes for sections 1, 4 and 5 three other sections. The only material change made by section 1 is to extend the duration of the franchises to 50 years, and to grant the right to distribute and maintain, "electric, telegraph, telephone and other wires." No material change was made in section 4. Section 5, as amended, besides declaring said company, its successors and assigns, a common carrier, requires a payment to the city for the rights and franchises granted semi-annually in advance of the sum of \$500. No provision is left for the use of wires by the city, or the right of any other company or person to use them.

Said National Subway Company was incorporated January 28, 1889, under the act providing for the incorporation of telegraph and telephone companies, now article 5, c. 42, Rev. St. 1889, with a capital stock of \$250,000, divided into 25,000 shares of \$10 each. The purposes of

the incorporation, as declared in the articles of association, are to construct, own, operate, and maintain a line of underground magnetic telegraph in the city of St. Louis. On the 5th of February, 1889, the board of directors sold and assigned all the rights and franchises granted by said ordinance to Charles Sutter, for the consideration of \$100. On the 25th of February, 1889, the St. Louis Subway Company was incorporated under article 8, c. 21, Rev. St. 1879, as a private business corporation, with a capital stock of \$500,000, divided into 50,000 shares of \$10 each, which was alleged to have been actually paid up in lawful money of the United States. Of this stock the said Charles Sutter subscribed for 49,800 shares. The purposes of this corporation, as declared in the articles, were: "To lay out and maintain, construct and operate, lines of subway in this State for the purpose of carrying wires for the transmission of electricity and electric currents, and in and about said business to acquire and hold such property, both real and personal, as may be requisite and necessary in the premises; to make all necessary leases, contracts and other agreements as may be required to carry out the purposes of the company." On February 28, 1889, this corporation was organized and purchased from Charles Sutter the rights and franchises granted under said ordinances, for which it agreed to pay \$498,000. Mr. Sutter accepted 49,800 shares of fully paid up stock in satisfaction of the purchase price. The other shareholders, except one who subscribed for 25 shares, paid up their stock by services rendered. From June, 1889, to the end of that year, the St. Louis Subway Company obtained permits upon plans approved by the board of public improvements, and caused a line of subways to be constructed, about 1 1-6 miles in length, as follows: On Broadway, from Elm street to St. Charles; on Market street, from Broadway to Tenth; on Tenth street, from Market to Chestnut; and on Chestnut street, from Tenth to Fourteenth streets. The

subways occupy a space in the street about six feet deep and three feet wide, with manholes about five to six feet in diameter at each street crossing, and at other points where obstructions are to be passed. From 1889 to 1894 nothing was done in the way of building conduits.

On the 10th day of May, 1890, John B. O'Mera obtained judgment against the St. Louis Subway Company in the St. Louis Circuit Court for \$8,869.23, for work done on the subways above mentioned, and on the 10th day of June, 1890, Emile A. Meysenburg obtained a judgment against it in the same court for \$42,911.22, on account of work, material and money applied to the construction of said subways. Upon these judgments executions were issued, and the sheriff seized all the right, title and interest of the St. Louis Subway Company in and to the franchise acquired by it under Ordinance 14,798, and all its title in and to the subways above mentioned, and all pipes, mains, iron, etc., belonging to said company, and on July 21, 1890, sold the same to Emile A. Mysenburg for the sum of \$1,000, to whom the sheriff executed a deed as for the sale of real estate. Alias executions were issued on said judgments, and the same property seized and sold under them, as personal property, on January 7, 1891, at which sale Emile A. Meysenburg was again the purchaser at the sum of \$500, and for which he received a bill of sale from the sheriff.

The relator, the St. Louis Underground Service Company, was incorporated February 26, 1891, as a private business corporation, under article 8, c. 42, Rev. St. 1889, with a named capital stock of \$1,000,000, divided into 10,000 shares of \$100 each, which is alleged to have been fully paid in lawful money. The stock was subscribed as follows: Emile A. Meysenburg, 9,000 shares; Robert McLaren, 250; Benjamin Von Puhl, 250; Andrew J. Cooper, 250; and Charles Sutter, 250 shares. The purposes for which this company was organized "are to lay

out and maintain, construct and operate, lines of subway in this State for the purposes of carrying wires for the transmission of electricity and electric currents; also to lay out, construct, and maintain and operate, lines of pipes, mains and conductors in this State for the purpose of distributing substances, either for fuel or illuminating purposes, or for both, and for said purposes to acquire and hold such property, both real and personal, as may be requisite and necessary in the premises, to make all necessary leases, contracts and other agreements, as may be required to carry out the purposes of the company." Emile A. Meysenburg, on March 10, 1891, for the expressed consideration of \$900,000, by bill of sale, transferred to the St. Louis Underground Service Company, all the property and rights he acquired by purchase at the sheriff's sales above mentioned. By this transfer he paid his subscription for the 9,000 shares of stock subscribed by him. From this time, March 10, 1891, until the summer of 1894, the St. Louis Underground Service Company did nothing in the way of building conduits. In May, 1894, relator made application for and received a permit to lay, and laid, a subway 180 feet in length, on Olive street, from Broadway east to an alley at the middle of the block, and south on said alley to a point opposite the operating room of the Postal Telegraph Company, in the Laclede Building; and on August 20th, it obtained a permit and constructed a subway on Fourteenth street, from Chestnut to the alley in the middle of the block, and about 16 feet into the alley, to a telegraph pole, about 165 feet in length.

In November, 1894, the relator made application in due form to respondent, as street commissioner, for permit to construct conduits on Chestnut street. The plans had previously been submitted to and approved by the board of public improvement. Respondent refused to grant the permit. This proceeding is by mandamus to require the respondent, as street commissioner, to grant the permit.

A writ was issued and respondent has made return thereto, to which relator demurred. From the pleadings and the evidence taken the foregoing facts are deduced.

While the legal questions involved are raised by demurrer to the return, the entire case was presented by oral argument and brief of counsel, and we will consider the merits of the case without regard to the form in which it has been presented.

1. A number of questions were discussed by counsel, both in argument and brief, but the most important, and, as we think, the controlling one, is whether the city of St. Louis had the power to grant to the National Subway Company the franchises now claimed by relator. If it had no such power, and is not estopped by what it has done in affirmation of its grant, the controversy necessarily ends, and consideration of other questions will be unnecessary.

Municipal as well as other corporations derive their power from the Legislature, and can exercise none not confided to them. To the charter of the city of St. Louis, then, we must look for authority to make the contract in question. *State v. Clark*, 54 Mo. 35. The charter undoubtedly vests in the city large power and control over the streets and other public property within its limits. It has power to establish, open and vacate all streets, public grounds and squares, and regulate the use thereof; to lease portions of the unimproved wharf; to license, tax and regulate telegraph companies and street railroad cars; to have sole power and authority to grant to persons or corporations the right to construct railways in the city; and, finally, to pass all such ordinances, not inconsistent with the provisions of the charter or the laws of the State as may be expedient in maintaining the peace, good government, health and welfare of the city, its trade, commerce and manufactures. Charter, Rev. St. 1889, pp. 2085, 2100.

The power to regulate the use of streets is very comprehensive. "The word 'regulate' is one of broad import. It

is a word used in the Federal Constitution to define the power of Congress over foreign and interstate commerce, and he who reads the many opinions of this court will perceive how broad and comprehensive it has been held to be." Mr. Justice BREWER, in *St. Louis v. W. U. Tel. Co.*, 149 U. S. 469. Under the power thus delegated, it cannot be questioned that the municipal authorities can permit the use of the surface of the streets for the erection of telegraph and telephone poles, and the laying of railroad tracks; the space above the surface for stringing electric wires for the transmission of messages and the creation of light; and may also permit the laying of water and gas pipes and sewers beneath the surface. *Julia Building Ass'n v. Bell Teleph. Co* 88 Mo. 258; *City of St. Louis v. Bell Teleph. Co.*, 96 Mo. 629; *Ferrenbach v. Turner*, 86 Mo. 416; *Schopp v. City of St. Louis*, 117 Mo. 136. These uses are all of a public nature, and are not inconsistent with the public uses to which the streets were dedicated. Under its general power to regulate the use of streets the city has authority to authorize corporations and persons, for the purpose of serving the public, to string telegraph, telephone or electric light wires, upon poles above the surface, or through conduits beneath the surface of the streets, provided such structures and mechanical appliances do not materially interfere with the ordinary uses of the streets and public travel thereon. But the city has no power, under this or any other provision of its charter, to authorize such a use of the street, though for a public purpose, as will destroy its usefulness as a public thoroughfare. *Lockwood v. Railroad Co.*, 122 Mo. 86; *Knapp, Stout & Company v. St. Louis Transfer Ry. Co.* (Mo. Supp.), 28 S. W. Rep. 629, and cases cited. So it is well settled that the city of St. Louis has no power to authorize the appropriation of any parts of any of its streets for private purposes. The power to regulate the use of streets refers to legitimate public uses not inconsis-

tent with the ordinary and paramount use for travel thereon, or with the private rights of abutting property owners. An ordinance having the effect of diverting the streets from a public to a private use, or of unreasonably appropriating them to a public use other than that of ordinary travel by pedestrians and vehicles, is *ultra vires* and void. *Knapp, Stout & Company v. St. Louis Transfer Ry. Co.*, *supra*; *Dubach v. Railroad Co.*, 89 Mo. 488; *Belcher Sugar Refinery Co. v. St. Louis Grain Elevator Co.*, 82 Mo. 124; *Schopp v. City of St. Louis*, *supra*; *Glaessner v. Association*, 100 Mo. 514.

It is true that these decisions and the principle declared were applied to grants authorizing the use of the surface of the streets. But the public use of streets, as has been said, is not confined to the surface, nor is the power of the city confined to that of regulating the use of streets and public grounds. To it is also delegated general police powers, and under them it is authorized to pass "all such ordinances as may be expedient in maintaining the peace, good government, health and welfare of the city, its trade, commerce and manufactures." In the exercise of the powers thus delegated, it has the undoubted right to regulate the public use of the streets, both above and beneath the surface. This it constantly does by allowing public sewers, water mains and gas pipes to be laid beneath the surface, and regulating the manner in which the work shall be done. It is said in a recent case: "This power to regulate the use of streets is not confined to the regulation of travel thereon, but under it the city may allow gas, water and sewer pipes to be laid therein, and may cause wells therein to be filled, and may permit the erection and maintenance of telegraph poles thereon. All these uses are consistent with the uses for which the streets are acquired or dedicated." *Schopp v. City of St. Louis*, 117 Mo. 136. The dedication of the streets, then, to public uses includes as well the soil beneath them as the surface itself.

The city authorities had the same power to regulate the use of the streets beneath as upon the surface thereof, and the power is in like manner limited to public uses. It has also been held that the general power to regulate the use of streets is not confined to public uses common and known at the time of the dedication, but extends to new uses as they spring into existence. *City of St. Louis v. Bell Teleph. Co., supra*. Under these well settled principles, there can be no doubt that the municipal authorities of the city of St. Louis, vested as they are with such enlarged control over property devoted to public uses, have the power to authorize, and, if public safety and general welfare demand it, to require, all electric wires, used for the benefit of the public, to be laid underground. This would be a proper and legitimate regulation of the public use of the streets. But the streets of a city are dedicated to public uses only, and are held by the municipality in trust for such uses. The trust is sacred, and the city has no authority, even under such enlarged powers as St. Louis possesses, to permanently divert any portion of it from these uses to such as are purely private. The question, then, is whether, under the ordinance granting to the National Subway Company of Missouri, its successors or assigns, the right to construct, maintain and operate conduits, pipes, mains, conductors, manholes and service and supply pipes in any of the streets, alleys, etc., of the city of St. Louis, during the term of 50 years, was for a public or private use. If for the latter, it must be held *ultra vires* and void.

While, under the pleadings, the issues were made by demurrer to the return, evidence was taken by the party and filed, and the case was argued as well upon the evidence as upon the allegations of the pleadings, we consider the question as presented under the pleadings and the evidence. "If it is doubtful or questionable whether

the use is public or not, testimony is admissible to determine the fact."

The purpose of the grant, as declared in the ordinance, is that of "distributing and maintaining a line or lines of electric, telegraph, telephone and other wires . . . to be used for the transmission of electricity for any and all purposes." By section 5, as amended, it is declared that such corporation, its successors or assigns, shall be a common carrier, and shall have and enjoy such rights, privileges, and immunities as are usually had and enjoyed by such companies." These are the only purposes expressed in the ordinance. A clause of section 5 in the original ordinance, which was omitted from the amendment, provided that said corporation shall permit "any persons, company or companies, to use said system of underground conduits" upon terms to be fixed as therein provided. There is nothing in the terms of the ordinance from which an inference can be drawn that the proposed conduits and wires should be used for the benefit of the public. The corporation was not at the time engaged in the business of transmitting messages by use of electric wires, or transmitting electricity for the purpose of producing light and no inference can be drawn that the proposed transmission of electricity was for use of the public. After the amendment of section 5 of the original ordinance, no obligation was left on said corporation to serve the public in any capacity.

The corporation to which the franchises were granted was chartered, under the general laws of the State, for the purpose of constructing, owning, operating and maintaining a line of underground magnetic telegraph in the city of St. Louis, but immediately on obtaining the franchises conferred by the ordinance it sold and assigned them to relator, into whose hands they are claimed to have passed by assignment. Relator was not even organized as a telegraph company. It was organized as a business corpora-

tion. Its purposes, as declared in its articles of association, are "to lay out and maintain, construct and operate, lines of subway in this State for the purpose of carrying wires, for the transmission of electricity and electric currents; also to lay out, construct and maintain and operate, lines of pipes, mains and conductors in this State for the purpose of distributing substances, either for fuel or illuminating purposes, or for both." So it appears that relator does not, under its charter, undertake to discharge a public duty by itself using the wires for telegraph or telephone purposes. Its purpose, so far as appears from the ordinance or charter, is to occupy the streets by subways and electric wires. It is placed under no obligations to use them, or cause them to be used, for the benefit of the public. Still, it claims the right to so occupy every street in the city for 50 years. No duty whatever is imposed upon it, no control over its works or business is retained by the city, except in the mere approval of the plans it may adopt for making the subways, and the manner of executing the work. The evidence shows that the object to be accomplished in granting these important franchises was to vest in one company the right to build suitable conduits, and to require all telegraph, telephone, and electric light companies to lease and use the wires of the favored company, its successors and assigns.

We do not think it necessary to inquire whether a contract of this character, had the objects been expressed, could be upheld. Such purposes were not expressed; on the contrary, the provision in section 5 of the original ordinance, which did give "any person or persons, company or companies," the right to use the system of underground conduits, was studiously omitted from the amended ordinance. As the ordinance now stands, relator is under no obligation to permit any telegraph, telephone or electric light company to use its wires, and it is thus given the power to control the use of the streets for its own private

benefit. We think the extraordinary rights, powers and franchises granted under the ordinances can only be construed to have been intended for the private use of said corporation, and that the city therefore had no power to grant them.

Much stress is laid upon the fact that the National Subway Company is declared, under the ordinance, to be a common carrier. But calling it a common carrier does not make it one. It has none of the characteristics of a common carrier. To ascertain how its franchises are to be used, we must look to the rights conferred and the duties imposed under its charter and the ordinance. Does it appear from these that relator invites employment from the public generally? Does it obligate itself to serve the public generally? Is it subject to regulation and control in respect to its dealings with the public? None of these essentials to a public business such as that of a carrier appear. On the contrary, it is clear, as has been shown, that a private business only is contemplated.

2. But it is insisted that inasmuch as relator and its assigns have gone to large expense, with the knowledge of the city, in constructing subways in some of the streets, and have paid to the city semi-annually, in advance, the sum of \$500 for the rights and franchises granted it, as required by section 5 of the amended ordinance, the city should not be estopped to deny the validity of the ordinance. There is no doubt that the doctrine of estoppel is, as a general rule, alike applicable to corporations and individuals. It cannot, however, be applied to validate a contract which the corporation had no power to make. The doctrine is thus declared: "Where a municipal corporation enters into a contract, which it has the power to make, the doctrine of estoppel applies to it with the same force as to individuals." *Union Depot Co. v. City of St. Louis*, 76 Mo. 393. The rule is thus given by Bigelow: "If the act undertaken was in and of itself *ultra vires* of

the corporation, no act of that body can have the effect to estop it to allege its want of power to do what was undertaken." Bigelow, Estop. (5th ed.) 466, 467. See, also, *Scovill v. Thayer*, 105 U. S. 143; *Thomas v. Railroad Co.*, 101 U. S. 86; *Pennsylvania Ry. Co. v. St. Louis A. & T. H. Ry. Co.*, 118 U. S. 317. In the case last cited it is said: "We know of no well considered case where a corporation which is party to a continuing contract, which it had no power to make, seeks to retract, and refuses to proceed further, it can be compelled to do so." As the city had no power to authorize the use of its streets for private purposes by ordinance, it certainly cannot do so by estoppel.

Peremptory writ denied.

BRACE, C. J., and ROBINSON, J., concur. BARCLAY, J., concurs in the result.

NOTE.—See note to *Grand Av. Ry. Co. v. People's Ry. Co.*, *post*.

STATE OF MISSOURI EX REL. ST. LOUIS UNDERGROUND SERVICE COMPANY V. WILLIAM J. MURPHY, STREET COMMISSIONER.

Missouri Supreme Court, February 13, 1896.

SUBWAYS FOR ELECTRIC WIRES.—MUNICIPAL POWER TO GRANT FRANCHISE.—MANDAMUS.

A municipal corporation has no power to grant the use of public streets for the construction and maintenance of electrical subways, by private individuals or corporations, though the sole purpose may be that of leasing them to public wire-using corporations, without reserving the power of supervision and control of all matters incident to location, construction, maintenance and use.

No such reserved power was to be implied; it must be expressed in the grant.

An ordinance by which a city undertook to grant to a private corporation

State v. Murphy, etc.

the right to maintain subways under every street for fifty years, to the practical exclusion of all other public uses, and to give it the practical control of the use of all public wires which might afterwards be required to go underground, held void, as an attempt to delegate powers which the city alone could exercise under its charter.

Cases of this series cited in opinion, appearing in bold faced type: *State ex rel. Laclede Gas Light Co. v. Murphy*, vol. 5, p. 71; *City of St. Louis v. Bell Teleph. Co.*, vol. 2, p. 44; *City of St. Louis v. W. U. Tel. Co.*, vol. 4, p. 115.

REHEARING of application for mandamus. See preceding case.

Poyle, Priest & Lehman, Robt. L. McLaran, John G. Chandler, and E. A. Noonan, for relator.

D. D. Fisher and Edw. C. Kehr, for respondent.

MACFARLANE, J.: This is an original proceeding by mandamus, the purpose of which is to require the respondent, Murphy, as street commissioner of the city of St. Louis, to grant relator a permit to construct conduits beneath the surface of Chestnut street, in pursuance of a contract claimed to have been made with the city under ordinances. The case was heard on a demurrer to respondent's return, and the demurrer was overruled. Relator, under leave of court, has answered the return. Evidence was taken, and the questions in issue have been argued and the case is now to be determined upon its merits. A full statement of the pleadings will be found to accompany the former opinion. Most of the evidence was also then on file, and was treated in the argument on the demurrer and in the opinion as forming a part of the record. The answer of relator is, in substance, a denial of the allegation of the return. The answer, by way of new matter, averred that its articles of association had been amended, whereby its purposes are more distinctly set out, as follows:

This company is organized for the purpose of laying out, constructing, maintaining and operating conduits or subways, pipes, mains, conductors, manholes, and service pipes in the streets, alleys, or other public places in the cities of this State and elsewhere, to be used in distributing and maintaining a line or lines of electrical and other wires owned by this company or others, together with all necessary feeders and service wires and other electrical conductors, and, when used for the wires of others, upon reasonable and just compensation; and to acquire and hold all necessary or useful grants, to occupy and use the streets, avenues, alleys, and other public places for the purposes aforesaid; to acquire and hold such property, real and personal and incorporeal, as may be requisite and necessary in the premises; to make all necessary leases, contracts, and other agreements as may be required to carry out the purposes of the company; to make proper by-laws, and to do and perform all such matters and things as may be necessary and usual for the effectual consummation of the purposes for which the company is formed.

The answer also, for the purpose of showing the intention of the parties in making the contracts and granting the franchises evidenced by the ordinances, stated at length the situation in the city of St. Louis in respect to the manner in which electricity was then carried, the inconvenience and danger of such methods, and the necessity of providing for placing electric wires underground. It charges that electric wires, for all the uses to which they are applied, are for the benefit of the public, as well as for the private gain of the owners; and that its subways "are intended and designed for the use of all persons, upon reasonable rates and like conditions, who may desire to use the same by placing wires therein, or connecting with wires to be laid therein; and its property and employment are thereby affected with public use, and, being so affected, whether its charter or the ordinances granting the right to construct and operate its works retains the reserved right to control and regulate the said conduits and the operation thereof or not. Such power, authority and control exist to the extent of protecting the public against danger, unjust discrimination, extortionate charges and injustice and oppression." The new evidence introduced bore upon the character of the uses to which electric wires are

applied, for the purpose of showing that all such uses are public in their nature, the inconvenience and danger of overhead wires, and the necessity, convenience and economy of placing them underground, and in one subway.

1. We are unable to perceive that the answer of relator, the amendment of its charter, and the supplementary evidence now before us have so changed the situation as to require a different conclusion from that reached upon the former hearing. On that hearing it was held that the city, under its charter rights, has the power to control and regulate the public use of its streets and public grounds, not only upon, but, if public safety require it, above and beneath its surface; and in the exercise of its general police powers it may require all electric wires whose uses are of a public character to be placed underground. But it was held further that the unconditional and uncontrolled grant contained in these ordinances was essentially for the private use of the grantee and its assigns, to which the city had no power to devote its streets. No claim was made on the first hearing, nor indeed can it be justly made now, that relator proposes to deal directly with the public. At most it only proposes for its own private gain to furnish others the instrumentalities by means of which they may subserve the public interest. Over the use, sale, assignment or lease of these instrumentalities the city has expressly reserved no control or management. The business thus proposed can no more be denominated public than could that of manufacturing electric wires for the use of a telegraph company, or rails for use in the track of a railroad, or pipes for conducting water or gas through the streets. A single instrument, though a necessary part of a public work, is not a public instrumentality, for the manufacture of which the power of eminent domain could be exercised even by the State. The use to which it may be applied is not the test of its public character. The use to which the entire work, and not parts of it, are to be

applied, is the proper test. The city of St. Louis made an unconstitutional lease of a portion of its public wharf to an elevator company to be used for erecting and maintaining a warehouse for the storing and handling of grain and other merchandise in connection with the use of its elevator. The power of the city to make the lease was questioned. This court held that, while the city had power to lease its unused wharf for the purposes specified in the lease, it had no right to authorize the erection of such buildings thereon without reserving a control over the buildings and the uses to which they should be applied. *Belcher Sugar Refining Co. v. St. Louis Grain Elevator Co.*, 82 Mo. 126. The court, in its opinion, says: "The owner of the building may open or close it at his pleasure, and may discriminate between shippers and receivers of produce, and make his a strictly private business, as if a retail dry goods merchant were permitted to erect a building on the wharf to conduct his business in. There is no reservation by the city in the lease to defendant of any control whatever of the building or business." The court says further: "The city has no right, and can acquire none from the Legislature, to make such a disposition of the property condemned for wharf purposes as will prevent her, in the event it should become necessary to extend and pave the wharf, from doing its duty in that respect." The same may be said in respect to the property held in trust by the city for public streets. The city has no power to divert their uses from those to which they were dedicated. It had no right to grant their use to relator for subways, though its sole purpose may be that of leasing them to public wire using corporations, without reserving the power of supervision and control, not only of the work of excavating in the streets, but of all matters incident to its location, construction, maintenance and use. No such powers have been reserved under these ordinances.

2. It is now insisted that, inasmuch as all the uses to which electric wires are ordinarily applied are of a public character, and as the subways are to be used by corporations exercising public functions, they are for public, and not for private, use, and the power of regulation and control is reserved in the municipal authorities. In other words, that the uses to which the subways are to be applied, and not the ownership, determines their character; and, if the use is public, the streets may be devoted to their maintenance, and the power to regulate is reserved. It may be conceded that the use of electric wires for the transmission of messages by telegraph and telephone, and for the distribution of light throughout the city for the use of its inhabitants, is essentially public in its character, and to which the public streets may be properly devoted. Indeed, the correctness of this proposition has been frequently declared by this court, and is recognized by the legislation of this State. *State v. Murphy*, [ante, p. 77], and cases cited; Rev. St. 1889, secs. 2721, 2792. It may also be conceded that, where the franchises granted by the government are for the purpose of subserving the public interests, power is reserved in the public to control the use for the common good, unless restricted in the grant. As has been said: "The rights of the public are never presumed to be surrendered to a corporation unless the intention to surrender clearly appears in law." *Perrine v. Canal Co.*, 9 How. 172. But it must be kept in mind that the city of St. Louis does not exercise original governmental functions, but only such measure thereof as the State has seen fit to delegate to it. Telegraph, telephone and electric light companies also receive their powers directly from the State. The reserved power to regulate them, unless within the delegated power of the city, rests in the State. These corporations are vested with power, under certain restrictions, to use the public streets of cities, and to place their wires and other fixtures under ground,

on obtaining the consent of the municipal authorities thereof. Rev. St. 1889, secs. 2721, 2793. It is evident that the city has no such reserved power over these wire using corporations as is possessed by the State. It can only exercise such powers as are "granted in express terms; those necessarily or fairly implied or incident to those expressly given; those essential to the declared objects of the corporation." 1 Dill. Mun. Corp. sec. 89; *City of St. Louis v. Bell Teleph. Co.*, 96 Mo. 625. The express powers bearing upon the rights here claimed are confined to general police powers and the power to regulate legitimate public uses of the streets. But the public corporations to which the relator proposes to lease the use of the streets, and through which it proposes to serve the public, has express power from the State to place its wires and other fixtures under ground in the streets of cities, provided it obtain the consent of the municipal authorities thereof. It is clear, therefore, that when a telegraph or other such corporation secures the right to lay its wires under ground in the streets of the city, no power of regulation is reserved by the city except such as is incident to the regulation of the use of the streets, and such as the safety and welfare of the public may demand. Any further rights must be secured by contract, as conditions of the grant. *City of St. Louis v. Bell Teleph. Co.*, *supra*; *City of St. Louis v. W. U. Tel. Co.*, 149 U. S. 469.

3. But, conceding that the subways relator proposes to construct are, without other requirements or conditions than those expressed in the ordinances, of such a public character and for such a public use as will authorize their construction in the public streets, and that the city has the power to confine their use to public purposes, we are still of the opinion that the ordinances are void, for the reason that the city thereby undertakes to delegate powers which it alone can exercise under its charter. The attempt is made under the ordinance to grant to the National Subway

Company and its assigns the right to occupy space for its subway beneath the surface of every street in the city for the period of 50 years, to the practical exclusion of all other public uses. It is given power to select its own patrons and dictate its own terms. It can elect upon which streets its works can be constructed. It can practically control the charges of all electric wire-using corporations. It has the practical control of the use of all public wires which may hereafter be required to go under ground. By the ordinances the city virtually surrenders to relator its power to regulate the underground use of its streets by wire-using companies, and permits their use for such public purposes only as may appear most profitable to relator. The contract can only be characterized as an attempt on the part of the city to surrender and bargain away to relator its charter powers. This it could not do. "Powers are conferred upon municipal corporations for public purposes, and as their legislative powers cannot . . . be delegated, so they cannot, without legislative authority, express or implied, be bargained or bartered away. Such corporations may make authorized contracts, but they have no power, as a party, to make contracts or to pass by-laws which shall cede away, control or embarrass their legislative or governmental powers, or which shall disable them from performing their public duties." 1 Dill. Mun. Corp. sec. 97; *Belcher Sugar Refining Co. v. St. Louis Grain Elevator Co.*, *supra*; *Matthews v. City of Alexandria*, 68 Mo. 119. In the case last cited the city of Alexandria undertook to lease to Matthews its wharf, which the city had power to regulate and control. In passing upon the validity of the contract, the court says: "No authority was given by the charter of the city to lease the wharf, or farm out its revenues, or to empower anyone else to fix the rate of wharfage. All these things were attempted to be done by the contract under consideration, and, being wholly unauthorized, the contract was illegal

and void. The legislative authority of the city could not be delegated, nor could the city abdicate its control over the public property held in trust by it for the benefit of the public." The evidence here shows, and common knowledge advises us, that economy of space, convenience to the public, security and proper adjustment of conflicting interests of the various competing companies make it desirable, if not necessary, that all electric wires should be laid in one subway; but the city cannot cede to another the power of supervision over them. That power can only be exercised by the city. Writ denied.

BRACE, C. J., and BARCLAY, J., concur.

NOTE.—See note to *Grand Av. Ry. Co. v. People's Ry. Co.*, *post*.

CITY OF PHILADELPHIA V. AMERICAN UNION TELEGRAPH
COMPANY.

Pennsylvania Supreme Court, April 8, 1895.

TELEGRAPH.—MUNICIPAL LICENSE FEE.

Ordinances imposing annual license fee on the poles and wires of a telegraph company are valid as an exercise of the police power and not invalid as regulations of interstate commerce.

Cases of this series cited in opinion, appearing in bold faced type: *W. U. Tel. Co. v. Philadelphia*, vol. 2, p. 98; *Chester v. Philadelphia, &c. Tel. Co.*, vol. 4, p. 91, note; *Allentown v. W. U. Tel. Co.*, vol. 4, p. 90; *Chester v. W. U. Tel. Co.*, vol. 4, p. 100.

APPEAL by defendant from judgment of Philadelphia County Court of Common Pleas in favor of plaintiff in an action for the recovery of license fees.

The following are the facts in the case: Defendant set up the defense that the ordinances were illegal and void, in that it had paid to the commonwealth of Pennsylvania

all taxes upon the value of said poles and wires as included in and represented by its capital stock, and upon the gross receipts derived from the use thereof and further, that it had accepted the act of Congress, approved July 24, 1866, and that the poles and wires in question were principally employed and operated in the transmission of messages between the different States, and were instruments of commerce; that the charge upon the wires and poles in question produced an amount that was more than ten times the cost of regulating and supervising the said poles and wires and issuing licenses therefor, and would produce revenue to the city, and was hence void as an exercise of the police power, and invalid for the reason also that it was a regulation of interstate commerce. The court made the rule for judgment absolute, and judgment was entered for the amount claimed, with interest, less the credit allowed.

These ordinances were before the court in the case of *W. U. Tel. Co. v. City of Philadelphia*, 22 W. N. C. 39, and there sustained. No point was made as to the lack of power to impose the license fees in question upon the defendant company upon the ground of its being engaged in interstate commerce, nor was any federal question raised, nor did the point arise in the case of *Chester v. Telegraph Co.*, 148 Pa. St. 120, for the reason that that company operated entirely within the State of Pennsylvania. The point appears to have been alluded to in the case of *Allentown v. Telegraph Co.*, 148 Pa. St. 117, though not referred to in the opinion of the court, and probably not pressed. It was attempted to be raised in the case of *City of Chester v. W. U. Tel. Co.*, 154 Pa. St. 464, but not decided by this court by reason of the defective character of the affidavit of defense.

John R. Read, Silas W. Petit and H. B. Gill, for appellant.

Chester N. Farr, Jr., E. Spencer Miller, Asst. City Sol., and Charles F. Warwick, City Sol., for appellee.

Per CURIAM: We find nothing in the record that would justify us in sustaining either of the assignments of error. There was no error in entering judgment against the defendant company for want of a sufficient affidavit of defense. Judgment affirmed.

NOTE.—See note to *Grand Av. Ry. Co. v. People's Ry. Co.*, *post*.

NEW CASTLE V. ELECTRIC COMPANY.

Pennsylvania County Court, Aug. 18, 1895.

(16 Pa. Co. Ct. R. 663.)

ELECTRIC LIGHT.—MUNICIPAL LICENSE FEE.

Municipal license fees may be collected in an action of debt against electric companies in default of their payment, although the ordinance imposing such fees provides in specific terms only for a penalty in case of default.

A contract entered into between a municipal corporation and an electric light company for the lighting of its streets carries with it the implied right to erect the necessary poles and wires in the streets for the purpose of carrying out the contract; and the city can impose no tax or license fee on any poles or wires used exclusively for such purpose.

Such tax or license fee may be imposed upon poles or wires not so exclusively used.

Cases of this series cited in opinion, appearing in bold faced type: *W. U. Tel. Co. v. Philadelphia*, vol. 2, p. 98; *Allentown v. W. U. Tel. Co.*, vol. 4, p. 90; *Chester v. W. U. Tel. Co.*, vol. 2, p. 98.

A. W. Gardner, City Solicitor.

Dana & Long, contra.

WALLACE, P. J.: This action comes before the court on a motion after judgment for want of sufficient affidavit of defense.

The city of New Castle passed an ordinance entitled "An ordinance providing for the licensing of telegraph, telephone and electric light poles and wires, and collecting of an annual license tax therefor," which ordinance was approved by the mayor on the 30th day of March, 1892. The defendant company being a chartered corporation doing business in the city of New Castle, caused to be erected therein a large number of poles and many miles of wire. The ordinance provides for an annual license tax of fifty cents on each pole and one dollar for every mile of wire; also a penalty for failing to take out said license.

The defendant corporation failed to take out said license as required by said ordinance, and refused to take out the same or pay the said license tax. The plaintiff thereupon brought this suit in this court and filed its statement of claim, which statement claims defendant is indebted to plaintiff for the license tax on the poles and wires as aforesaid, in the sum of \$939, being tax on 570 poles at 50 cents each and 27 $\frac{1}{4}$ miles of wire at \$1 each mile or fraction thereof over a mile, for the years 1892, 1893, 1894, and makes the ordinance part of said statement.

The defendant files its affidavit of defense and alleges in substance that the city cannot maintain this action for the following reasons:

- 1st. Ordinance does not provide for action of debt.
- 2nd. Ordinance only provides for penalty.
- 3rd. City has no power or authority to pass said ordinance.
- 4th. Ordinance is void, because it contains more than one subject.
- 5th. Action can only be maintained for two years.

Defendant claims that plaintiff cannot maintain this action for the reason of a certain contract entered into between the plaintiff and the defendant, whereby the defendant was to furnish and is now furnishing the said plaintiff with electric lights to light said city, and by

reason of said contract the said city cannot maintain this action against defendant. Also, said tax is unreasonable. In considering this case, reasons 1, 2, 3, 4 and 5 can be considered together. True, the ordinance only provides in specific terms for a certain penalty, and does not in so many words provide for action of debt, yet our courts have frequently held that such a license can be collected in an action of debt. We do not think it necessary to discuss the principles and questions brought forth by each of the questions raised in the above reasons, but following the rule laid down by our Supreme Court in *Western Union Telegraph Company v. Philadelphia*, 22 W. N. C. 39, which appears to rule each of these questions, we next go to the case of *Allentown v. Western Union Tel. Co.*, 148 Pa. 118, where the same principles are fully discussed and the case first named followed. Also, we have the case of *Chester v. Western Union Tel. Co.*, 154 Pa. 466, where the same doctrine is laid down. And that leads us to the last case reported, the case of *Philadelphia v. American Union Tel. Co.*, Adv. Rep., where the same doctrine is laid down by a per curiam opinion, and that opinion was very short.

From the principles laid down in the cases cited we are led to the conclusion that under the law the city has a right to collect such license in an action of debt; that the fact of the ordinance only providing penalty does not hinder or bar the action in debt. Hence we find no merit in the statement that the city has no authority, neither do we find any merit in the reason that the ordinance is void for the reason of its containing more than one subject. The object of the title is to give notice of the contents of the bill or ordinance. The title to this ordinance clearly indicated the contents of the ordinance and hence is regular and constitutional. The defense, that an action can only be maintained for tax within two years, can not

be sustained for the reason that this is a question in debt and not a penalty, and hence can be collected, if at all, for a period of six years. These propositions, as well as the defense that the amount is unreasonable, have been fully discussed and ruled in the cases above cited, and we cannot in this action give any weight to them, and so far as those reasons are concerned, judgment ought to be entered for want of sufficient affidavit of defense.

That brings us to the next element of defense in this case, to wit: the contract with the plaintiff to furnish electric lights for the city. A contract was made by the Electric Illuminating Company of Chicago, Ill., with the city of New Castle for the furnishing of a certain number of electric lights for the purpose of lighting the city of New Castle. This contract was assigned to the New Castle Electric Company, the defendant. Additional or supplementary contracts were signed by both parties, whereby the said Electric Company was to furnish electric lights to the said city, at a certain price per annum; that said company was granted the right to erect poles and wires for the purpose of lighting said city; that the contract stipulates that said poles and wires were to be erected and maintained subject to the police regulations of said city and under the supervision of the city engineer.

As we understand the law, where a party makes a contract to do a certain thing for another, which contract requires the use of that party's property, and the party owning the property having knowledge of what use the contract would require of his property, and with such knowledge signs said contract, he gives his implied consent to the rightful use of such property for purpose of said contract. In other words, when the city of New Castle entered into the contract with the defendant in this case for the furnishing of light for the said city, and signed the contract for the same subject to the supervision of the police department of the city or the city engineer, they

gave the right to erect poles and wires sufficient to furnish such light, otherwise it would be unjust and inequitable. When the city entered into the contract with the defendant to light the city they gave them the right to erect poles and wires to carry out said contract, and cannot now impose a tax or levy for police regulation on any poles or wires that are used exclusively for the purpose of carrying out said contract.

With this view of the law, we are of the opinion that the city of New Castle has the right to levy a tax for the purpose of police regulation on all poles and wires not used for the exclusive use of the city contract, and that those poles and wires used for the exclusive use of the city contract are exempt from any taxation.

Now, August 12, 1895, the rule in this case is made absolute as to the poles and wires not used exclusively for the city contract, and judgment is hereby entered in favor of plaintiff and against the defendant for the sum of one hundred and thirty-three dollars and eight cents, with costs of this proceeding.

IN RE CHIPCHASE.

Kansas Supreme Court, Jan. 11, 1896.

(56 Kan. 357.)

TELEPHONE COMPANY.—MUNICIPAL LICENSE FEE.

(Head-note by the court):

Without proof of the privileges enjoyed and the burdens borne by a telephone company in a city of the first class, or of the expenditures, indebtedness and necessities of the city, it cannot be said, as a matter of law, that a license tax against the company of \$12 per annum for each business 'phone, and of \$10 per annum for each residence 'phone, used by the company within the city, is excessive, prohibitive, or oppressive.

Bentley & Ferguson and Glead, Ware & Glead, for petitioner.

George W. Adams and John W. Adams, for respondent.

JOHNSTON, J.: On September 13, 1895, H. G. Chipchase, the manager of the Missouri & Kansas Telephone Company at Wichita, was arrested for the violation of an ordinance of the city of Wichita imposing a license tax on telephones, and prescribing penalties for using them without complying with its requirements. The first section of the ordinance provides that any company, corporation or person engaged in the telephone business in the city of Wichita shall pay a license tax of \$12 per annum upon each business 'phone, and a tax of \$10 per annum for each residence 'phone, used in carrying on such business, and making it unlawful to carry on the business without having obtained from the city clerk a license therefor. The second section provides that, if any com-

pany, corporation or person carries on the business without procuring a license, they will forfeit the sum of \$25 for each day that each 'phone is used or operated. The third section makes it an offense to carry on the business without paying the tax and procuring a license, and provides that any manager, agent, servant or employe of a company, corporation or person who shall violate the ordinance shall, upon conviction, be fined in any sum not exceeding \$100. The telephone company of which Chipchase was the manager was engaged in the telephone business in Wichita, and it is alleged that the company had about 290 telephones in use within the corporate limits of the city. The company refused to pay the license tax or otherwise comply with the provisions of the ordinance, and, upon a complaint made, Chipchase was arrested, under a warrant issued by the police judge of the city of Wichita. Upon the application of Chipchase, the writ of *habeas corpus* was issued. In the return of the city marshal, he sets forth the fact that Chipchase is in his custody by virtue of a warrant duly issued as aforesaid, and also setting out a copy of the city ordinance under which the petitioner was prosecuted. Chipchase excepts to the sufficiency of the return, and asks to be discharged from custody. It is insisted by the petitioner that the ordinance is void, first, because the license tax is unreasonable and excessive; second, because it obstructs and places a burden upon interstate commerce; third, because the instruments upon which the license taxes are assessed are covered by letters patent.

In the application for the writ are found allegations to the effect that the license tax imposed is grossly excessive, and that as the business of the company extends beyond the limits of the State, the license tax amounts to a tax on interstate commerce. These and other averments of the application, however, are not admitted in the return to the writ, and they were denied by counsel for respondent

at the hearing. The questions so well argued by counsel are, therefore, not ripe for decision, nor do any of the objections made afford grounds for the discharge of the petitioner. No issue was joined nor proof offered in the case.

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As the ordinance is included in the return, we may inquire and determine whether upon its face it is valid. Express authority has been given by the Legislature to levy and collect license taxes upon all callings, trades, professions and occupations, including telephone companies, within the limits of cities of the first class. (Gen. St. 1889, ¶¶ 555, 804.) In such cases it has been held that the municipality is not limited to the mere expense of regulation, but that they may be imposed for the purpose of obtaining revenue to meet the general expenses of the city. *Fretwell v. City of Troy*, 18 Kan. 271; *City of Newton v. Atchison*, 31 id. 151; *Tulloss v. City of Sedan*, 31 id. 165; *City of Cherokee v. Fox*, 34 id. 16; *City of Wyandotte v. Corrigan*, 35 id. 21; *City of Girard v. Bissell*, 44 id. 66. While the tax levied appears to be very large, we cannot say as a matter of law that it is excessive, nor can we without proof hold that it is oppressive or prohibitive. In *Fretwell v. City of Troy*, *supra*, it was said that "the mere amount of the tax does not prove its invalidity." The city cannot impose a license tax beyond the necessities of the city, nor can it impose one so excessive as to prohibit or destroy the occupation or business. *City of Lyons v. Cooper*, 39 Kan. 324. Many things, however, enter into the determination of what constitutes a just and reasonable license tax, but as to the conditions existing in Wichita we are not advised. There is the nature of the franchise or privileges enjoyed by the company within the city, the prices which they charge for the service given by it to its patrons, the amount of property tax, if any, paid by the company, the current

expenses of the municipality, and the amount of its indebtedness. Without information upon these questions, the court cannot determine that a license tax of \$12 per annum upon a business 'phone and \$10 upon a residence 'phone is prohibitive, excessive or oppressive. *Habeas corpus* may not be the most appropriate proceeding in which to determine the questions presented and discussed by counsel, but, before we can decide them in this proceeding, an issue must be joined, and the facts must be either established by proof or agreed upon by the parties. The petitioner will be remanded.

All the justices concurring.

NOTE.—See note to *Grand Av. Ry. Co. v. People's Ry. Co.*, *post*.

GEORGE W. POTTER V. SCRANTON TRACTION COMPANY.

Pennsylvania Supreme Court, July 15, 1896.

(176 Pa. St. 271.)

RIGHT OF STREET RAILWAY COMPANY TO CHANGE MOTIVE POWER.—
SUPERIOR RIGHT IN STREET TO REPAIR WIRE.

Whatever may be the right of a street railway company to change from time to time its method of operation without municipal consent, *held*, that a private citizen could not raise the question in an action for personal injuries, caused by an accident occurring five years after such changed method had been in operation without objection.

A company operating an electric street railway has the right to use the usual and ordinary appliances for repairing its wires, for a reasonable time, superior to the right of travelers in the street.

Cases of this series cited in opinion, appearing in bold faced type: *Reeves v. Philadelphia Traction Co.*, vol. 4, p. 24; *Ehrisman v. East Harrisburgh, &c. Ry. Co.*, vol. 4, p. 486.

APPEAL by plaintiff from judgment of Lackawanna County Court of Common Pleas.

Ward & Horn and I. H. Burns, for appellant.

W. H. Jessup, Everett Warren, Horace E. Hand and W. H. Jessup, Jr., for appellee.

Opinion by Justice MITCHELL: The main contention in this case is that the railway company, not having the express consent of the borough to use the trolley system on its road, was so far a trespasser *ab initio* that its appliances both for running and repairing were nuisances, and, as against the appellant, constituted negligence in law. The discussion of this proposition would require the consideration of two questions, first, the right of the People's Street Railway Company to use the trolley system on its road; and, secondly, the additional right, if any, acquired by its lessee, the Traction Company, under its own charter. The People's Company was chartered by special act March 23, 1866 (P. L. 1199), as a street passenger railway, without mention of motive power. The road was operated by horse power until 1888, when the company, without express consent of the borough, but without objection either from the borough or any abutting property owner, changed its motive power to the electric trolley system. The Scranton Traction Company was incorporated under the act of March 22, 1887 (P. L. p. 8), with an express right to use "electrical or other appliances," but subject to the consent of the borough. In 1892 it leased the People's line, and continued to operate it by the trolley system without express consent, but without objection by the borough.

How far the franchise for a passenger railway, without specific limitations or prohibitions as to motive power, carries with it the right from time to time to operate it by new methods, developed in the progress of invention and experience, is an important question, which was referred to but not decided in *Reeves v. Phila. Traction Co.*,

152 Pa. St. 153, 163, and in this case it is complicated by the fact that the change was not made until after the adoption of the present Constitution. It is clear that the Traction Company, chartered since the Constitution, could not, of its own authority, make any change of motor power which would increase the servitude on the street without the municipal consent. Whether the People's Company could do so, after 1874, by virtue of implied but unused powers under a charter previously granted, is a matter of very serious doubt.

But we do not think the appellant is in position to raise the question. The change from horse power to trolley was made in 1888, and the new motor continued in use, first by one company and then by the other, without objection, for five years before this accident occurred. Whether the consent of the borough was necessary or not, it must be presumed in this action by a private citizen. Consent may be by ratification, as well as by previous permission; and it was held, in *Pennsylvania S. V. R. Co. v. Philadelphia & R. R. Co.*, 160 Pa. St. 277, that, at least as to private parties, if not as to the municipality itself, consent may be waived by acquiescence without objection in a long continued act. We are of opinion that, under the facts of the present case, the trolley line must be presumed to have been rightfully on the street, and therefore not a public nuisance, which entitles appellant to ask a ruling that its maintenance is negligence *per se*.

Having the right to maintain its line, the appellee of course had the right to repair it from time to time, and to use all necessary and ordinary appliances in doing so. The learned judge so charged, and, though his use of the word "paramount," in reference to such right, is assigned for error, yet it is only made such by separation from its context. The jury were told the company "had not a paramount right, an exclusive right, to the use of the

street, but they had an equal right with other travelers on the highway. They had an equal right with Mr. Potter upon the street; no greater, no less. They had the right . . . to use this appliance, if it were an usual and ordinary one, upon the track, for a reasonable time, to repair the overhead wire. Their right for a reasonable time was paramount and greater than the right of Mr. Potter." This was a correct statement of the law. It was no more than an illustration of the general rule that, although the right of a street railway, even to that part of the street occupied by its rails, is only in common with that of other travelers, yet where its right, to be available at all, must be exclusive, as, for example, for unobstructed passage, it is of necessity for the time being superior or paramount. *Ehrisman v. Harrisburgh R. Co.*, 150 Pa. St. 180.

The remaining assignments do not require further discussion. Taken in their connection, as they occurred in the charge, the expressions of the learned judge were substantially correct, and could not have misled the jury to appellant's injury.

Judgment affirmed.

NOTE.—See note to next case.

GRAND AVENUE RAILWAY COMPANY v. PEOPLE'S RAILWAY COMPANY.

Missouri Supreme Court, December 23, 1895.

ELECTRIC STREET RAILWAY.—COMPENSATION FOR USING TRACK OF CABLE ROAD.

In fixing the compensation to be paid by an electric street railway company for the use of the track of a cable railway, such use being authorized by statute, *held*, proper to base the rental upon the actual cost of the cable road, including cost of the underground conduit, although the conduit was in no way useful to the electric company, and the cost of construction of the conduit was three-fourths the cost of the whole roadway.

The cable road company should be made good for its loss, to wit, the deprivation of the use of the road, without reference to the benefit of the electric company.

APPEAL by plaintiff from judgment of St. Louis Circuit Court in a proceeding to determine the compensation to be paid by plaintiff, an electric street railway company, for the use of the tracks of the defendant, a corporation owning and operating a cable street railway. The following is a portion of the statement of facts by the court:

These proceedings were instituted by the plaintiff, a street railroad corporation of St. Louis, under provision of Ordinance No. 12,652 of that city, for the purpose of determining the just compensation to be paid by plaintiff to the People's Railway Company of St. Louis for the use of the tracks of the latter on Grand avenue from Lafayette avenue to Tower Grove Park, which plaintiff was authorized to use, and intended to use, in the operation of its own railroad. By section 6, art. 10, of the city charter of said city it is provided that:

Any street railway company shall have the right to run its cars over the tracks of any other railroad company, in whole or in part, upon the payment of just compensation for the use thereof, under such rules and regulations as may be prescribed by ordinance, and it shall be the duty of the municipal assembly to immediately pass such ordinances as may be necessary to carry this provision into effect.

An ordinance (No. 12,652) was enacted under the provisions of the city charter quoted, which conferred on the plaintiff the right to use that part of defendant's track as before stated, upon paying defendant compensation for such uses under the provision of said ordinance. The ordinance, in case the two companies cannot agree upon the compensation to be paid for such uses, provides for the appointment of three commissioners by the mayor to hear evidence, examine the track, and determine the compensation to be paid, and the time and manner of payment. The award is to be in writing, returned to the mayor, whose duty it is to return the same, with all the papers connected with the proceedings, to the city register. Either party may file written exceptions to the report of the commissioners, and appeal to the Circuit Court, where the exceptions are to be heard, and such orders made as justice and right may require, or a new appraisement may be ordered upon good cause being shown. The Circuit Court, after hearing the cause, rendered the following decree:

"First. The said Grand Avenue Railway Company, plaintiff, is entitled, under general ordinance of the city of St. Louis No. 12,652, and special ordinance of the city of St. Louis No. 17,047, given in evidence, to use for the operation of its street railway the following portions of the tracks of said defendant, on Grand avenue, in the city of St. Louis, namely, . . . with the right also to make all proper switches and connections with said tracks with said defendant's railway company, reference also being made for further description to the plans of said plaintiff for said

use and occupation approved by the board of public improvements of the city of St. Louis; subject, however, to an obligation on the part of said plaintiff company to pay annually to said defendant company, as just compensation therefor, an amount equal to interest at 6 per cent. per annum on one-half the value of said portion of said defendant company's line, including the conduit; also one-half the annual taxes on said part of said defendant's line; one-half the annual cost of repairs and maintenance of the tracks and granite paving; one-half the cost and expenses, annual, of keeping the said tracks free and clear of snow and ice; one-half the cost of renewing the said tracks and granite paving of said portion of said line of defendant's railway, whenever such renewals shall be required, as to which amounts the parties hereto are not, and have not been, able to agree; said right of use to be continuous against said defendant company, its lessees and assigns, so long as said defendant or its lessees or assigns shall own, use, or operate the same, subject, however, to the provisions of City Ordinance No. 12,652, and of any and all ordinances of said city governing and regulating such joint use."

The remainder of the decree relates to details of procedure which are outlined in the foregoing.

Judson Taussig, for appellant.

G. L. Finkelnburg, for respondent.

BURGESS, J. (after stating the facts): The following is a statement of the facts by the learned trial judge: "The People's Railway Company operates its cars by means of cable power, and its roadway is so constructed. The Grand Avenue Railway will be operated by electric power with overhead wires and trolley system. Out of this difference in the method of operation arises one of the

questions to be determined. For the operation of a cable road it is necessary to construct and maintain under the surface of the roadbed a conduit. For this purpose excavation is made along the entire length of track of sufficient width and depth, and in this is set a hollow wooden form, the outside of which is made to conform to the desired shape and size of the conduit required, and then the entire excavation outside of this form is filled in solid with cement concrete, which, when settled, makes a permanent conduit, in which are placed the pulleys on which the cable runs. Owing to the fact that the cable thus operates under the surface of the ground, and that the cars are to be operated by it, it is necessary to provide a continuous means of connection between the cars and cable, and this is done by having the top of the conduit made with a narrow longitudinal opening over which are placed two flat iron wires which constitute the 'slot' through which the 'grip' is extended into the conduit in such manner as to readily take hold and let go the cable, and thus to operate the cars. The necessity of this 'slot' prevents the use of the ordinary ties and stringers used in the construction of the street railroad operated by electricity or horse power, and to supply their place iron yokes are used in the construction of the cable roadway. These are set in the excavation before the concrete is filled in, and are so made that they furnish a convenient place upon which the slot wires can rest and be securely fastened. Such a roadway is very expensive, and the defendant's roadway costs at the rate of \$12 per running foot of single track. The construction of a track for an electric roadway in the city would not be over \$15,840 per mile, or \$3 per running foot "

1. Plaintiff's first contention is that the decree rendered by the Circuit Court is erroneous, in that it is based on an incorrect view of defendant's property rights in the tracks proposed to be used. Especially it is claimed that the

court erred in respect to two matters embraced in its decree: First, including the conduit underneath the tracks in the determination of the value on which interest is to be paid as annual rental; and, second, in its requirement concerning payment of renewals of the tracks and paving. As bearing upon these questions it may be conceded that the defendant has no exclusive franchise or property right in its occupancy of any street on which its tracks have been laid. The city has no power or authority to confer upon any corporation the exclusive right to use one of its streets for its own business. *St. Louis Transfer Ry. Co. v. St. Louis Merchants' Bridge Terminal Ry. Co.*, 111 Mo. 666, and *Kansas City, St. J. & C. B. R. Co. v. St. Joseph Terminal R. Co.*, 97 Mo. 457. It would seem, then, to logically follow that the only right defendant has in the street is the right to occupy and use the same for the purpose granted, subject, however, to the right of the city to permit any other company to run its cars over defendant's road, as the public convenience might require. In speaking of the rights of parties situated similar to the parties to this suit in *Union Depot R. Co. v. Southern Ry. Co.*, 105 Mo. 562, the court said: "Plaintiff owns its road and franchises, it is true; but the city has the reserved power in the interest of the public welfare to permit any other company to run its cars over the plaintiff's road, for such is the contract between the plaintiff and the city. The city has exercised this reserved power, and has granted to the defendant the right to use the plaintiff's tracks. There is, therefore, no necessity for resorting to any process of condemnation to acquire the right, for it is fixed by law and the contract of the parties. There remains nothing more to be done but to ascertain the 'just compensation' to be paid to the plaintiff, and that must be ascertained by and under the ordinance. The proceedings pointed out by the ordinance for ascertaining the compensation do not involve the exer-

cise of the right of eminent domain. It is simply a proceeding to enforce contract rights, and has none of the elements of a suit to condemn property for public use." But because defendant possesses no exclusive right to the use of the street it does not follow that its rights are not paramount to those of plaintiff, defendant having first occupied the street under a contract with the city. It is true that plaintiff is granted the same right to run its cars on Grand avenue from the same considerations that originally induced the grant of defendant's franchise, and that it is required to make use of defendant's tracks between Lafayette avenue and Tower Grove Park; but it can make no possible difference whether such right be public or private, as the only way that it can be exercised is by the payment of just compensation as provided by the city charter. There was nothing allowed defendant in this case for diminished profits on account of competition in carrying passengers, or for the value of its franchises. It is therefore unnecessary to pass on those questions.

2. The court allowed defendant an amount equal to interest at 6 per cent. per annum on one-half the value of that portion of its road occupied by plaintiff, including the conduit; and plaintiff claims that, as it only uses defendant's tracks, and does not use, directly or indirectly, any part of the conduit or underground structure which defendant uses for the purposes of cable railroad underneath the tracks, it should not be required to pay anything therefor; and that the court erred in including that item in its estimate of the amount to be paid defendant as just compensation, and in including said amount in the judgment rendered. It is conceded by counsel for plaintiff that, if the operation of its cars over the tracks caused any damage to the conduit, such damage would be a proper element of compensation, and that, in so far as the yokes perform the office of ties in supporting the tracks, the value of ties should be included in the amount upon which interest is

computed. The fault of the argument is the want of premise upon which to base it. No ties were used in the superstructure of the road, and in estimating the just compensation to be paid we must take the conditions as we find them. The phrase "just compensation," as used in the charter of the city and its ordinance, has the same meaning which that phrase has when used in the Federal and State Constitutions with respect to the exercise of the right of eminent domain; and when thus used "means a fair and full equivalent for the loss sustained by the taking for public use." Lewis Em. Dom., sec. 462, and authorities cited. In *Bigelow v. Railway Co.*, 27 Wis. 478, it is said that it "consists in making the owner good by an equivalent in money for the loss he sustains in the value of his property by being deprived of a portion of it." While plaintiff does not use the conduit, it does deprive defendant of its use to the extent that its tracks are occupied by plaintiff's cars, because the cars of the respective parties cannot occupy the same portion of the tracks at the same time. The conduit is an integral part of the roadway as constructed and used by defendant, and there would be no justice in allowing plaintiff to use the tracks, and thereby deprive defendant of the use of the conduit to any extent, without making compensation therefor. Certainly plaintiff would not be permitted to occupy one of defendant's tracks, or rails, and thereby at the same time deprive it of the use of the other track or rail, without making just compensation for the one not used. There is no difference in principle in occupying the tracks, and during such occupation, and by reason thereof, depriving defendant of the use of the conduit, than in occupying one track or rail, and by reason thereof at the same time depriving defendant of the use of the other. In either case compensation should be made. There was no compulsion on the part of plaintiff to occupy defendant's tracks; and the fact that the superstructure was more costly, and some parts of it

unnecessary to the operation of plaintiff's cars, affords no just reason why it should not compensate defendant, not only for that which it does use, but also that of which it deprives defendant of the use. This is the measure of the compensation to which defendant is entitled, and nothing short of it would be "just compensation."

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NOTE.—The foregoing fifteen cases relate to the power of municipal corporations to regulate the use of their streets by electrical companies, using either overhead or underground appliances; to their right to impose a license fee as compensation or indemnity for the use of streets; and generally to the occupation of streets by such companies, not including however, cases involving the rights of owners of land abutting upon streets so used.

In *State, Consolidated Traction Co., Pros. v. City of Elizabeth et al.*, New Jersey Supreme Court, March 20, 1896 (34 Atl. Rep. 146), the principle that a State Legislature, in authorizing a street railway company to occupy public streets, does so subject to the power of municipal corporations to enact such ordinances as do not unreasonably interfere with the exercise of the franchise granted, was applied in support of an ordinance prohibiting a street railway company from placing salt on its tracks.

In *Pennsylvania R. Co. v. Turtle Creek Valley Elec. Ry. Co., et al.* Pennsylvania Supreme Court, January 4, 1897 (36 Atl. Rep. 348), it was held that "municipal consent to a line of street railway connecting a given municipality with other towns or cities does not justify the company to which it was given in building and operating a local road within the boundaries of that municipality (citing *Penna. R. Co. v. Montgomery Co. Pass. Ry. Co.*, 5 Am. Electl. Cas. 166). The projected road is a unit. It cannot be cut up into fragments by the corporation for its own advantage, and at its own pleasure; when this is attempted, the company and its employes become trespassers, and may be treated as such" (citing *Thomas v. Inter County St. Ry. Co.*, 5 Am. Electl. Cas. 175).

In *Colonial City Traction Company v. Kingston City R. Co.*, N. Y. Supreme Court, Appellate Division, Third Department, March, 1897 (15 App. Div. 195), it was held, to quote from the head note, that "section 91 of the Railroad Law, as amended by chapter 545 of the laws of 1895, forbidding the extension or operation of a street surface railroad or of its branches unless 'the consent of the local authorities havin_ control of that portion of the street or highway upon which it is proposed to build or operate such railroad shall have first been obtained,' is to be construed in connection with section 102 of the Railroad Law, as amended by chapter 698 of the laws of 1894, forbidding a street railroad corporation from constructing, extending or operating its road or tracks in that portion of any

street, avenue, road or highway in which a street surface railroad is or shall be lawfully constructed, without first obtaining the consent of the corporation owning and maintaining the same, except for a distance not exceeding 1,000 feet, if the court, upon application, is satisfied that the public convenience requires it;" and that

"The effect of these provisions is that before a street surface railroad can have the right to operate its road through any street in a city, it must procure the consent of the local authorities, although another company is already operating its road through such street, and that it must procure the right to the use of such street as a part of its route before it can commence proceedings to secure the right to use the property of another company upon and as a part of such route."

In *City of Brooklyn*, Appellant, v. *Brooklyn City & Newton R. Co.*, N. Y. Supreme Court, Appellate Division, Second Department, December, 1896 (11 App. Div. 168), held that in an action to recover a penalty imposed by ordinance for running electric cars beyond a given rate of speed in the streets of a municipal corporation, the County Court had no power to reverse a judgment of a justice of the peace upon the ground that his decision was against the weight of evidence.

THE YORK TELEPHONE COMPANY V. KEESEY.

Pennsylvania District Court, Feb. 24, 1896.

(5 Pa. Dist. Co. R. 366.)

TELEPHONE LINE.—ABUTTING OWNER.

A telephone company having planted poles without having complied with a city ordinance requiring it to submit to the mayor a written application designating the number, size and position of its poles, and to pay a license fee, an abutting owner incurs no liability in cutting down one of such poles planted in the street in front of his property.

An ordinance making such company "liable for all damages caused to public or private property by reason of said privilege" does not require the making of compensation to abutting owners a prerequisite to the placing of poles.

A telephone company is a telegraph company; and therefore (1) is embraced within the meaning of the words "telegraph company" in the title of a statute, so as to obviate the objection that the subject is not clearly expressed in the title; and (2) has the right of eminent domain.

The use of streets and highways by telephone companies under legislative and municipal consent, does not constitute a new easement for which the abutting owner is entitled to compensation.

Cases of this series cited in opinion, appearing in bold faced type: *Russ v. Cent. Pa. Teleph. Co.*, vol. 5, p. 109; *Cent. Pa. Teleph. Co. v. Wilkesbarre R. Co.*, vol. 4, p. 260; *Pierce v. Drew*, vol. 1, p. 571; *W. U. Tel. Co. v. Williams*, vol. 3, p. 184; *Board of Trade Tel. Co. v. Barnett*, vol. 1, p. 565; *Lockhart v. Craig St. Ry. Co.*, vol. 3, p. 314.

H. M. Wanner, for motion.

Latimer, Chapin & Schmidt, contra.

STEWART, J.: This is a bill in equity, filed by The York Telephone Company v. Horace Keesey, praying for a preliminary injunction, special until hearing and perpetual thereafter, enjoining and restraining him and his agents and employes from interfering with either the erection or maintenance by the complainant of a telephone pole located at the southwest corner of West Market and Beaver streets, in the city of York, in front of his property. A special preliminary injunction was granted upon the presentation of the bill supported by affidavits, on Jan. 24, 1896, and a hearing had thereon on Feb. 14, the defendant in the meantime having filed his answer to the bill.

The York Telephone Company is a corporation duly incorporated under the act approved April 29, 1874, entitled "An act to provide for the incorporation and regulation of certain corporations," and under the supplement thereto approved May 1, 1876. It has secured from the municipal authorities of the city of York permission to erect poles and run wires thereon in the streets, lanes and alleys of the city of York, by an ordinance of the said city approved Oct. 15, 1895, which ordinance is set out in the plaintiff's bill. This was a special ordinance and required the company to comply with the provisions and regulations of all ordinances then in force or which might thereafter be enacted by the city.

The only ordinance in existence at the passage of said special ordinance applicable to a telephone company is a general ordinance of Nov. 17, 1893, which provides that:

It shall be the duty of such corporation, firm or individual, before any poles are erected or wires or cables stretched, to submit to the mayor of said city a written application, specifying the number and size of poles to be erected, and designating the places where the same are to be inserted; and, if no objections be made thereto, it shall be the duty of said mayor to issue a license to the applicant for the erection of said poles at the designated places of insertion. In case of objections being made to the whole or any part of such application, it shall be the duty of said mayor to hear the same, and to grant the license either in accordance with the application, or with such conditions and modifications to serve the purpose of this ordinance as the case may require.

No poles shall be newly erected unless the license of said mayor shall have been previously obtained therefor, as provided in this section, and for every license so granted there shall be paid to the city treasurer for the use of the city the sum of fifty cents for each and every pole proposed to be erected.

This ordinance, in section 5, provides as follows:

Any corporation, firm or individual which is now enjoying or may enjoy hereafter the privilege of erecting poles within the limits of this city for the purpose provided in the ordinance, shall be liable for all damages caused to public or private property by reason of said privilege.

The complainant, without having submitted the application required by the first section of this ordinance to the mayor, specifying the number and size of poles intended to be erected, and designating the places where the same were intended to be inserted, and without paying the license fee required by the ordinance, proceeded to plant and erect their poles along the streets of the city, one of which was erected at the curb on the corner of West Market and South Beaver streets, in front of the defendant's property. This pole the defendant cut down. The complainant then prepared a written application intended to comply with the ordinance, designating the number and size of the poles which they proposed to erect, but without

specifying the places where the same were intended to be inserted, excepting in a few instances, one of which is that of the pole erected in front of the defendant's property, which is specified as follows: "One 35 foot pole at the southwest corner of West Market street and Beaver street." This application was presented to the mayor on the evening of Jan. 23, 1896, and the evidence taken at the hearing discloses the fact that the defendant and his counsel were present when the application was presented to the mayor. There is no evidence that any notice was given to the defendant to be there at that time, but there was some evidence that the city solicitor, as a matter of courtesy, had notified H. M. Wanner, Esq., the defendant's counsel, that the application would be presented to the mayor.

The application was presented to the mayor in the presence of the defendant and his counsel, who made no formal objection to the issuing of the license other than to say that he objected. The complainant alleges that the defendant declared his determination and intention to resist the erection of any pole in front of his premises, and threatened to cut down and overthrow any pole which the complainant might erect at that point. The complainant alleges that he did this both before and after the issuing of the license. The defendant denies this in the ninth paragraph of his answer, but admits that before the plaintiff company paid the license fee he did say substantially that if the plaintiff would erect a pole on the southwest corner of Market and Beaver streets in said city, he would have it cut down, which is virtually an admission of the complainant's allegation. The complainant alleges that the defendant denies that it is essential and necessary to the conduct of its business, and to the continuity of its line to plant a pole at the point in dispute, the defendant claiming that it could locate its line in the alley back or

south of Market street. The evidence shows that there are already two electric lines in this alley, which is confirmed by the court's actual knowledge. Under the evidence the southwest corner of Beaver street is a necessary location for a pole in order to carry out the scheme or plan for the erection and construction of the complainant's system of lines, not absolutely necessary, but conveniently so, and only so because the company has already located one of its principal lines on Market street, the principal street in the city, which, as we understand from the evidence, is to be crossed by another line at right angles on the west side of Beaver street.

There are substantially no other facts in controversy in this proceeding, the questions raised being principally questions of law. The principal questions involved in this issue are: 1. The validity of the general ordinance. 2. The sufficiency of the application for the license and the granting of the same without notice. 3. Constitutionality of the Act of May 1, 1876, under which the complainant's charter is granted. 4. The right of the complainant to erect its poles without first having paid or secured the damages occasioned by the erection and construction of its line.

As to the first and second objection: That the complainant had no right to plant and erect its poles without having first filed the application required by the general ordinance, designating the number, size and position of its poles, and without having paid the license fee, cannot be denied, and the city or any property owner affected by such erection can raise the question. When, therefore, the defendant cut down the first pole erected in front of his premises he was guilty of no improper conduct, and could not be held responsible for so doing. However, he now stands upon a different footing. The complainant did make application to the mayor, and it did specify the location of the pole which was to affect him with sufficient

certainty, and, although he had no formal notice of the application to be made to the mayor, he did have knowledge of the fact of the making of the application, and was present and had an opportunity to object. The general ordinance is defective, inasmuch as it does not require the specification of the location of the poles to state definitely and precisely where and upon whose property they are to be located; nor does it provide for any notice to be given to the parties affected, so that they may appear and object. Nevertheless, the defendant having been present at the granting of the license, cannot raise this question. The object of notice is knowledge, and he had this. Nor do I think that the payment of damages by the company to the property holder, under the 5th section of the ordinance, is a condition precedent to its right to plant its poles. It seems to me that this covers only such damages as might actually be occasioned by the erection and maintenance of the poles, and not such as are of a consequential nature, nor such as the defendant would be entitled to demand payment of or security for prior to the erection or construction of the line.

There is no allegation that the pole was to be planted in front of any window or door, as there was in the case of *Russ v. Central Pennsylvania Telephone Company*, 15 C. C. 226, which would make the location improper. The pole is located on the angle of the curb, and is, perhaps, as much out of the way of the public and of the people using the defendant's property as it could be placed and still be within the range of the two streets, and so as not to oblige the complainant to cross private property in the construction of its line.

As to the third question: The Act of May 1, 1876, P. L. 90, is entitled 'An act supplementary to an act to provide for the incorporation and regulation of certain corporations,' approved April 29, 1874, relative to the incorporation and powers of telegraph companies for the use of individuals,

firms and corporations, and for fire alarm, police and messenger business."

The constitutionality of the act is attacked upon two grounds: First, that the subject of the act is not clearly expressed in its title; and second, that it authorizes the construction, maintenance and leasing of telegraph lines for private use of individuals, firms and corporations. The first objection is based upon the words contained in the first section as follows: "Or for the transaction of any business in which electricity over or through wires may be applied to any useful purpose." This is not expressed in the title, and a reading of the title might give no notice of it.

Telegraphy is the transaction of business over or through wires and is a useful purpose; so is telephonic communication; but it is not necessary to resort to this clause of the title of the act to sustain the incorporation of a telephone company, because a telephone company is a telegraph company, and both complainant and defendant contend that this is so, and this contention is sustained by the authorities: *Central Pennsylvania Telephone Company v. Wilkesbarre R. R. Co.*, 1 Dis. Reps. 628; *Com. v. Pennsylvania Telephone Company*, 18 Phila. 88; 25 Am. & Eng. Ency. 746-747. It is not necessary that the title of an act should be an index of its contents: *Com. v. Green*, 58 Pa. 226. It is sufficient if it fairly gives notice of the subject of the act: *Alleghany County Homes' Appeal*, 77 Pa. 77; *Mauch Chunk v. McGee*, 81 Pa. 433. The act is supplementary to the general incorporation act, and is germane to the subject of the original act. This, it seems, is sufficient: *Craig v. Presbyterian Church*, 88 Pa. 42; *Com. v. Sharon Coal Co.*, 164 Pa. 305.

As to the third question: Of course the company could not be incorporated with the right to

take property, either public or private, for private business, and if this be the intent of the act, it would be unconstitutional. But a telephone company is not so incorporated. It is a telegraph company equipped with the right of eminent domain, and like a telegraph company, is a *quasi* public corporation, and must serve every one who applies for its service on equal terms. It is not therefore a corporation for private business, and this objection fails.

Now, as to the fourth question: The complainant did not agree with the defendant as to the question of damage, nor offer any security therefor. It contends that he sustains none. It takes none of his property, and if it injures any it is *damnum absque injuria*.

The defendant contends, and this is the real contention in the case, that the erection of the plaintiff's poles, wires and fixtures interrupts the light and air, and interferes with his and his tenants' enjoyment of them, and increases the risk of his property to fire and injury, and imposes a new burden and servitude on his property not contemplated by the use of the city streets. The company must, of course, show its authority for what it proposes to do; otherwise it is a trespasser and a nuisance. Has it done so?

The telephone company finds its authority to use the streets in the language of the act of April 29, 1874, P. L. 73, sec. 33, which provides:

Such corporation (a telegraph company) shall be authorized when incorporated as hereinbefore, to construct lines of telegraph along and upon any of the public roads, streets, lands (lanes ?) or highways, or across any of the waters within the limits of this State, by the erection of the necessary fixtures, including posts, piers or abutments, for sustaining the cords or wires of such lines, but the same shall not be so constructed as to inconvenience the public use of the said roads, streets or highways. . . .

The Act of May 1, 1876, P. L. 90, regulates the exercise of this power by section 4, as follows:

That before the exercise of any of the powers given under this act, application shall be first made to the municipal authorities of the city, town or borough in which it is proposed to exercise said powers for permission to erect poles or run wires on the same, or over or under any of the streets, lanes or alleys of said city, town or borough, which permission shall be given by ordinance only, and may interpose such conditions and regulations as the municipal authorities shall deem necessary. . . .

This is a sufficient legislative authorization to the company, coupled with the municipal consent contained in the ordinance, to enable it to erect its poles and wires. It is therefore not a public nuisance. *Dillon on Municipal Corp.*, vol. 2, sec. 698; *Tiedeman on Municipal Corp.*, sec. 297.

Does the erection of poles and stringing of wires in front of the defendant's property impose an additional servitude upon it? Is it such a burden as was contemplated when the street was either condemned or dedicated? Manifestly not, since the street was either dedicated or condemned more than a hundred years ago, long before the wildest dreamer imagined such a thing as the transmission of articulate speech over an electrified wire, and before Franklin first drew the electric spark from the cloud. But the same might be said of lamp posts, gas and water pipes, street railways, both horse and electric, and it has been ruled, as to all of these, that they do not impose an additional servitude. *McDevitt v. Gas Co.*, 160 Pa. 367.

The exact question has never been decided in this State. The text writers agree that it does. *Tiedeman on Municipal Corp.*, sec. 297; *Dillon on Municipal Corp.*, sec. 698.

The decided cases in other States are both ways and in conflict, the court of last resort in Massachusetts holding that the erection of a telegraph line in a city did not impose an additional servitude, and the Court of Appeals of Virginia holding the contrary, and in both cases by divided court. *Pierce v. Drew*, 136 Mass. 75; *Western Union Tel. Co. v. Williams*, 3 Am. & Eng. Corp. Cases, 564. To the same effect as the decision in Virginia is the decided doc-

trine in Illinois: *Board of Trade Tel. Co. v. Barnett*, 107 Ill. 508.

After much consideration I have come to the conclusion that the question is ruled by the opinion of Judge STOWE, adopted by our Supreme Court in *Lockhart v. Railway Co.*, 139 Pa. 419.

I can find no distinction between telephone poles and wires and those of the trolley line of a street railway that is not in favor of the former. They are planted no nearer the houses; they are higher and carry the cross arms up generally out of the range of the windows; they are charged with but a light current of electricity; they are subject to no great strain, and are not likely to fall, and if they do, they are harmless, unless in falling they come in contact with the trolley lines, now usually their neighbors, carrying torrents of death and destruction in their heavy voltages, but which the Supreme Court has held impose no additional servitude.

That the trolley lines are a part of a system of travel or transportation does not seem to me to change the principle. They are not an essential part. Horse power and steam power still exist, capable of moving all cars, so that the trolley is not an essential, but only more convenient, and certainly a much speedier method of locomotion. Though new and not essential they are said not to impose an additional burden, but are held to be a beneficial and legitimate public street use. *Rafferty v. Central Traction Co.*, 147 Pa. 579. It is such a use as was in general contemplation when it was said by the Supreme Court, almost sixty years ago that the streets are subject to the paramount authority of the Legislature in the regulation of their use by carriages, rail cars or means of locomotion *yet to be invented*. *Philadelphia and Trenton R. R. Co.*, 6 Wh. 25-44. In this case it is further said: "In Pennsylvania the street is the property of the people, not of a particular district, but of the whole State, who, constituting, as they do, the

legitimate sovereign, may dispose of it by their representatives and at their pleasure. It may now be taken as settled that the owner's rights as to abutting property are subject to the paramount right of the public, and the rights of the public are not limited to a mere right of way, but extend to all beneficial legitimate street uses, such as the public may from time to time require." *Lockhart v. Railway Co.*, 139 Pa. 419. In this case, which was a motion for an injunction, Judge Stowe said: "The case presented by the plaintiff is not so clear from doubt that the chancellor should grant an injunction summarily stopping a great public improvement (the construction of a street railway) before final hearing, more particularly if the position taken by the plaintiff is correct, and defendants have no legal right to take possession of the streets as they are about to do. A common law action will compel them to pay all damages arising to the plaintiffs and thereafter equity would probably afford a complete remedy, by which the wrong done them could be fully corrected."

What was said as to the complainants there may, with equal propriety, be said as to the defendant here on his motion to dissolve. If the complainants are wrong, to which I do not now agree, they will be responsible to him for all damages, and unless they assert their right of eminent domain he can compel them to remove the pole; and if they do, he can compel them to pay or secure his damages; while, if I removed this injunction, this authorized public improvement would be interrupted, and might suffer irreparable injury. I will therefore continue the injunction in force until the final hearing, directing the complainant, however, to file a new bond in the sum of \$2,000 in lieu of the bond filed.

It appeared at the hearing that in pursuance of some contemplated amicable arrangement the complainant had erected a 45 foot instead of a 35 foot pole at the *locus in*

quo, which is a technical violation of the complainant's license to which the defendant objects; I will therefore dissolve the injunction unless it is shown by affidavit that the pole erected has been reduced to the proper height within twenty-four hours.

NOTE.—See note to *Thouren v. Schuylkill Elec. Ry. Co.*, *post*.

THE STATE OF NEW JERSEY (ABBY STORY MARSHALL,
PROS.) v. THE MAYOR AND COMMON COUNCIL OF THE
CITY OF BAYONNE.

New Jersey Supreme Court, June 22, 1896.

TELEPHONE LINE.—MUNICIPAL CONTROL.—ABUTTING OWNERS.

It is not necessary for a common council, in designating the several streets through which a telephone company shall construct its line, to specify the precise place in the street where each pole shall be located, nor to require the company to obtain the consent of abutting owners before erecting poles in front of their respective lots.

The written consent of owners of the soil is by statute a prerequisite to the placing of telephone poles in any street or highway in the State of New Jersey.

CERTIORARI to review a municipal ordinance. Facts stated in opinion.

Rowe, Van Buskirk & Parker, for the application.

Thomas F. Noonan, opposed.

GUMMERE, J.: This is an application for a *certiorari* to remove into this court for review an ordinance of the city of Bayonne designating the streets through which the New York & New Jersey Telephone Company shall erect its poles and construct its line. The first section of the ordinance designates the streets through which the company's line

shall be built. The second section prescribes the manner in which the poles shall be placed in said streets, and is in the following words:

The said posts or poles shall be located placed and erected within and adjacent to the curb line where shown by the official maps of the city of Bayonne, and within eighteen inches thereof, at such points as may be indicated by the street commissioner, not more than 150 feet apart.

The principal grounds upon which the application for a writ is based are: First, that the ordinance does not make the consent of the property owners in front of whose lots telephone poles are to be placed a condition precedent to the erection of such poles; and, second, that it does not locate the poles or specify the distance apart at which they shall be placed. The ordinance was passed in response to an application made by the telephone company to the common council in accordance with the direction contained in section 1 of the supplement to the act to incorporate and regulate telegraph companies (Supp. Revision, p. 1022), and complies in all respects with the requirements of that supplement as well as with those of the original act (Revision, p. 1174). The common council have nothing to do with the matter of the consent of abutting property owners to the erection of poles. The Legislature itself has declared that no telephone pole shall be erected in any of the streets or highways of this State except with the written consent of the owner of the soil. Revision, p. 1175, sec. 8. Any attempt on the part of a common council to modify this condition imposed by the Legislature would be void, and a reiteration of it by ordinance would be entirely without force. Nor is it necessary that the ordinance should specify the location of the poles, or how far apart they shall be placed. The telephone act provides that, upon the request of the company, the common council "shall designate the streets in which their posts or poles shall be placed and the manner of placing the same."

Telegraph Cable Co. v. Bruen.

Supp. Revision, p. 1022, sec. 1. The exact location of the several poles is intentionally left by the statute, as it seems to me, to the applying company, subject, of course, to the supervision of the municipal authorities; the purpose being that such poles shall, as far as possible, be placed in front of those properties the owners of which consent to their erection. This result could not be accomplished if the common council was required not only to designate the streets in which the poles should be erected, but also to fix the exact location of each pole. The ordinance complained of, designating, as it does, the streets in which the company shall place its poles, and the manner of erecting the same, meets every requirement of the statute, and its provision that the work shall be done under the direction of the street commissioner fully protects the public interests. The other reasons upon which the writ is asked have been considered, but do not appear to the court to be of sufficient weight to entitle them to specific criticism. The application for a *certiorari* should be denied.

NOTE.—See note to *Thouren v. Schuylkill Elec. Ry. Co.*, *post*.

POSTAL TELEGRAPH CABLE COMPANY V. LOUISA J. BRUEN.

New York Supreme Court, Second Judicial Department, Before Commissioners of Appraisal, in Condemnation Proceedings, 1896.

TELEGRAPH POLES.—RIGHT OF ABUTTING OWNERS.—CONDEMNATION.

In view of the rules, first, that the use of streets for the construction and operation of telegraph and telephone lines is a legitimate use, subject to the right of the abutting owner to compensation, and second, that the amount to be awarded to the abutting owner, for his compensation, is the difference in value before and after the erection of the poles; and in view of the facts that only three of the poles in question were visible from defendant's house, that defendant's view was not obstructed, that

little trimming of defendant's trees was done, that defendant's right of access to her property was not interfered with, and that only twelve parcels of defendant's real estate, each eighteen inches square and three or four feet deep, were appropriated; *held*, that defendant was entitled to only nominal damages.

Cases of this series cited in opinion, appearing in bold faced type: *Eels v. Am. Teleph. & Tel. Co.*, vol. 5, p. 92; *Pierce v. Drew*, vol. 1, p. 571; *People v. Eaton*, vol. 5, p. 86; *Julia Building Ass'n v. Bell Teleph. Co.*, vol. 1, p. 801; *Halsey v. Rapid Transit St. Ry. Co.*, vol. 3, p. 283.

FACTS stated in opinion.

Charles A. Dryer, for plaintiff.

Alexander J. Bruen and John F. Coffin, for defendant.

Opinion: This was a proceeding to acquire by the law of eminent domain the right to place and maintain twelve telegraph poles in front of the defendant's land in the town of Scarsdale.

The property owned by the defendant is purely residential property, and is adapted for the country seat of a gentleman of wealth. The lawns are spacious, and are beautified by a growth of trees which years of care have brought to maturity; and the view from the house, in the direction of the Long Island Sound, is unsurpassed.

The testimony of the witnesses on either side, as to the value of the property, was widely different; but the commission does not seem called upon to fix the value. The property is undoubtedly valuable; and, to a person of wealth, desiring an inland country seat, accessible to the railroad and to New York City, the highest sum fixed by the witnesses as to its value would probably not be extravagant.

The poles erected by the plaintiff are of the average quality and style of telegraph poles. Some of them are set in a slanting position, probably owing to the fact that the highway opposite the premises in question runs on a curve

and on a descending grade. The beaten track of the road does not run in the center of the highway, but is nearer to the fence line on the opposite side. The poles are about 150 feet apart. A personal inspection of the premises, at the season when there is no foliage on the trees, showed that, at no one point of view from the house, could more than two poles be seen, and that only three poles are visible from the house altogether. In the summer time, it is probable that not a single pole could be seen from the house, owing to the trees and foliage. Owing to the distance of the beaten track from the fence, the plaintiff was enabled to set the poles so as to occasion but little trimming of the trees. There was a dispute as to one pole, whether it is on defendant's property or not, but it is assumed that it is on defendant's property. The defendant's witnesses testified that the damage to the property was from three to five thousand dollars; while plaintiff's witnesses testified that the poles did not cause any injury.

There can be no doubt that the use of the highways of the State for the construction and operation of telegraph and telephone lines is a legitimate use, subject to the right of the owner to compensation. Such use is not only authorized by the statute (Laws of 1890, ch. 566, sec. 102), but has received the sanction of the Court of Appeals. *Els v. Am. Telephone & Telegraph Co.*, 143 N. Y. 133. The rule to guide this tribunal, in fixing the amount to be awarded to the abutting owner, is the difference between the value of her property before the entry of the corporation and its present value. *R. R. Co. v. Arnot*, 27 Hun, 151; *R. R. Co. v. Duddleston*, 29 Hun, 609.

The defendant's witnesses did not undertake to show such difference in the value of the property in question; but merely testified as a conclusion that the damage was from three to five thousand dollars. Neither of said witnesses testified that the value of the property was three to five thousand dollars less than before the erection of the

poles. There is no question as to the ability and competency of the witnesses in question, and the conclusion to which the commission has arrived does not detract from their worth or cast any reflection upon their testimony. It is sufficient to say, that they were undoubtedly actuated by motives of sentiment in placing their estimate. Sentiment, however, has no place in a calm and deliberate examination of facts. The plaintiff must pay and the defendant is entitled to receive just what damage has been suffered. Anything else would be manifestly unjust. It is true that one would prefer that a telegraph line should be built on some other highway than that on which he lives; but it must be remembered that the telegraph is a public necessity, and its lines must be built upon some highway and have a lawful right to occupy the same. Few of our main thoroughfares are exempt from the presence of poles, and it would be a difficult matter for a prospective purchaser to find an advantageous place of residence in the country free from the presence of telegraph lines.

As already seen, the poles in question do not obstruct any view from the defendant's house, and with three exceptions they are not visible therefrom. Neither do they interfere with her entrance to her property. Any element of damage, therefore, arising from obstructions to view or to entrance to the property does not enter into this case. The prospect from the defendant's house which imparts value to the property is toward the north, east and south, and is not obstructed in any degree by telegraph poles.

What then is the defendant's damage in dollars and cents? The telegraph company has appropriated twelve parcels of the defendant's real estate, each of which is probably not more than eighteen inches square and three or four feet deep.

In an Illinois case, the *Mutual Tel. Co. v. Katkamp*, 103 Ill. 420, a finding of \$38.50, as damages for a strip

of land eighteen inches wide extending across defendant's land which was what is known as a "quarter section," was held to be manifestly against the evidence, and the judgment was reversed.

In the case at bar it appeared that some branches had been cut off from the defendant's trees, to avoid contact with the wires, but not to such an extent as to injure the value or appearance thereof.

The conclusion to which the commission has come, therefore, is that under the circumstances, from the evidence produced and from their own inspection, the damage to the defendant is but nominal, and we have so fixed the same in our award.

In the case above cited, *Eels v. Tel. Co.*, Judge PECKHAM, in writing the opinion of the court, uses the following language:

"It (the company) has the power to take the land upon making compensation, and hence the refusal of an owner will not stop the proposed undertaking. The amount of compensation is not now the question, but that in many cases it can not be anything more than merely nominal would seem to be a proposition which would not require great elaboration of argument to make plain. The use would frequently be but a technical encroachment upon the rights of the adjoining owner, and there would be but little to fear that anything more than nominal damages would be allowed."

While this language is *obiter*, it cannot be said to have been improperly incorporated in the decision of the court, and loses none of its force for that reason.

In Massachusetts the courts have held that the use of a highway for the purpose of placing telegraph poles thereon is but a newly discovered method of exercising the old public easement either for the transportation of property or transmission of intelligence. That such use is similar to if not identical with that public use of transmit-

ting information for which the highway was originally taken, even if the means adopted are quite different from the post-boy or mail coach. Therefore, all appropriate methods must be deemed to have been paid for when the road was laid out, and the abutting owner is entitled to an additional compensation for the use of such highway for telegraph purposes. *Pierce v. Drew*, 136 Mass. 81.

In another case, the *People v. Eaton*, 51 N. W. Rep. 147, the court says that when lands were taken or granted for public highways, they were not taken for such use only as might then be expected to be made of them by the methods of travel or of the transmission of intelligence then in use, but for such methods as improvement and future discoveries might demand.

In a Missouri case, *Building Association v. Bell Tel. Co.*, 80 Missouri, 258, the court says that the poles used by the complainant were a necessary part of the system. When they do not interfere with the owner's access to and the use of his lands there is no reason why they should be held to constitute an additional servitude. There must be an injury to the present use and enjoyment of his land. They do not interfere with his coming or going at his pleasure when placed as they can and must be so as to give him free access. Wherein then is the injury? Public convenience and necessity must control in all such cases.

In a New Jersey case, *Halsey v. R. R. Co.*, 47 N. J. Eq. 380, the Vice-Chancellor held that the erection of poles in a street for electric railway purposes, imposes no additional burden for which the abutting owner is entitled to compensation, and that the slight obstruction of the street caused by poles for electric wires does the abutting owner no irreparable injury different from that suffered by the public at large, so as to entitle him to equitable relief.

The foregoing, together with other decisions in different States of the Union, to which it is unnecessary to refer,

confirm us in the belief that the conclusion to which we have arrived is just and equitable.

(Signed), JAS. B. LOCKWOOD, Chairman; JAMES H. MORAN, STEPHEN A. MARSHALL, concurring.

NOTE.—The report of the commissioners was confirmed by Mr. Justice DYKMAN, of the Supreme Court of New York, on April 14th, 1896.

I am indebted for the above report to William W. Cook, Esq., of New York City.

See note to *Thouron v. Schuylkill Elec. Ry. Co.*, *post*.

H. WILSON BLASHFIELD, Appellant, v. THE EMPIRE STATE
TELEPHONE AND TELEGRAPH COMPANY, Respondent.

New York Court of Appeals, November, 1895.

(147 N. Y. 520.)

TELEPHONE LINE IN STREET—IMPROPER EVIDENCE OF DAMAGE TO ABUTTING
OWNER.

In an action for damages to an abutting owner by reason of the construction of a telephone line in the street, evidence of the value of his land as it would have been if the poles had not been erected cannot be received.

APPEAL from order of General Term of Supreme Court, Fourth Judicial Department, which reversed judgment for plaintiff entered upon report of referee, and granted new trial.

Franklin Pierce, for appellant.

Frederic E. Storke, for respondent.

PECKHAM, J.: This action was commenced to recover damages alleged to have been sustained by the plaintiff's assignors by the building of the defendant's telephone line along the highway opposite their lands. These owners, numbering some sixty different individuals, assigned their claims to the plaintiff, who brought this action, and after trial before a referee succeeded in recovering judgment in

his favor in a total of several hundred dollars. The defendant denied some of the material allegations of the complaint, and also set up as an affirmative defense that plaintiff's attorney had purchased the various causes of action for the purpose of bringing suit thereon, and that the plaintiff had no real interest in the subject matter of the action, and was in reality only the representative of the attorney. A further defense was that whatever damages had been sustained were the result of the acts of an independent contractor, for whom the defendant was not liable. Upon the trial evidence was taken tending to prove the damage sustained by each assignor by reason of the building of defendant's line and the erecting of poles in the highway abutting upon his land. In the course of the trial, the plaintiff, in addition to other and competent evidence upon the subject of damage, gave expert evidence under the objection and exception of the defendant in relation to the value of the land as it would have been if the poles had not been erected. This evidence, it is assumed on both sides, was erroneous as within the principle of our decision in *Roberts v. Elevated R. R.*, 128 N. Y. 455.

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NOTE.—The important question under consideration in the foregoing case, both before the General Term (reported 71 Hun, 532. and a portion of the opinion re-printed 4 Am. Electl. Cas. 146) and before the Court of Appeals, grew out of the act of the referee in striking out, after the case was submitted, the evidence referred to in the above fragment of opinion, he having in the meantime become convinced of its incompetency.

The General Term held that such striking out was error, and for that reason reversed the judgment.

The Court of Appeals, while agreeing with the court below that such action of a referee would ordinarily be condemned, decided that this case was exceptional by reason of the circumstances, first, that there was other evidence sufficient to warrant the referee's determination; second, that by stipulation of the parties the referee was permitted to and did make a personal examination of the premises, and thus had power to add his own observation to the testimony of witnesses; and third, that the referee notified the attorneys for both parties, before making his decision, of his action in striking out the evidence, and thus gave them an opportunity to move to re-open the case and supply further evidence.

WILLIAM D. PALMER, Respondent, v. LARCHMONT ELECTRIC COMPANY, Appellant.

New York Supreme Court, General Term, Second Department, June, 1896.

(6 App. Div. 12.)

ELECTRIC LIGHT APPLIANCES IN HIGHWAY.—ABUTTING OWNERS.

The Court of Appeals having decided in *Eels v. Am. Teleph. & Tel. Co.* (5 Am. Electl. Cas. 92), that telegraph and telephone posts and wires could not be maintained in a rural highway without compensation to the owner of abutting land, held that the same rule must apply also to the appliances of an electric light company having a contract with the town authorities for lighting a highway.

This in spite of the fact that the *locus in quo* was in an unincorporated village, and that in *Whitcher v. Holland Water Works Co.*, 66 Hun, 619, affirmed, without opinion, 143 N. Y. 628, it was held that in such a village the abutting owner's rights were subject to the urban public easement for carrying a water supply; the court finding sufficient distinction in the different conditions of overhead structures and those underground.

APPEAL from judgment of Supreme Court, Westchester county, upon the decision of the court without a jury.

Wm. Sam. Johnson, for the appellant.

Wm. Porter Allen, for the respondent.

BROWN, P. J.: This appeal presents the question whether an electric company, having a contract with the proper town authorities to light a public highway, may erect poles and wires upon said highway without the consent of the abutting owners.

In *Eels v. American T. & T. Co.*, 143 N. Y. 133, the Court of Appeals decided that neither the State nor any corporation could appropriate any portion of a rural highway by setting up poles for the support of telegraph or telephone wires. That decision was based upon the fact

that the fundamental idea of a highway was a place for the uninterrupted passage of men, animals and vehicles, and to afford light, air and access to the property of abutting owners; that, in the latter respect, an abutting owner had a greater interest in the highway than the general public; that, consequently, any permanent or exclusive use of any part of the highway by any person or corporation was illegal.

Upon that theory of the law it is impossible to make any distinction between poles intended to carry telegraph or telephone wires and poles intended to support electric light wires.

The counsel for the appellant, however, distinguishes *Eels'* case from the case at bar on the ground that the maintenance and operation of a telephone or telegraph line is not a proper street use, while the maintenance of poles and wires for the purpose of lighting the street is a proper street use. The cases cited to sustain this argument, with two exceptions, which will be hereafter noticed, relate to easements in the streets of cities and incorporated villages, where such rights are conceded to be greater than in purely rural districts. It has never, however, been decided just how far the easements in urban streets will be extended beyond those in rural highways, and the court, in *Eels'* case, declined to decide the question, and its consideration is not important to our decision in this case.

In the case of *The Bloomfield, etc., Gas Light Company v. Calkins*, 62 N. Y. 386, it was decided that a gas company had no authority to lay its pipes in a country highway without the consent of the abutting owners. In that case, however, the pipes were not sought to be laid for the purpose of lighting the highway or the property of abutting owners. The principle of law, however, upon which the decision was based was the same as that applied in *Eels'* case, that the right of the public in the highway was a mere

right of passage. *Trustees, etc., v. A. & R. R. R. Co.*, 3 Hill, 567.

If, therefore, we were to decide this case solely upon the character of a country highway and the rights therein of the public and the owners of the abutting land, it would be impossible to sustain the right of any person or corporation to appropriate absolutely to its use any part of the street. The possession of any part of the land would be adverse to the rights of the abutting owner and totally opposed to the legal character of the public easement in the highway.

The appellant cites two other cases which may be briefly referred to. *Van Brunt v. Town of Flatbush*, 128 N. Y. 50, was an action by owners of lands fronting on Flatbush avenue in the town of Flatlands, to restrain the street and sewer commissioners of the town of Flatbush, acting under an act of the Legislature, from constructing a sewer through that avenue without the consent of the owners of the soil or the acquisition of their title in the manner provided by law. The projected sewer was for the benefit of the town of Flatbush and the inhabitants thereof and not for the benefit of the owners of the lands along Flatbush avenue in the town of Flatlands. The court held that the sewer could not be constructed upon the plaintiff's property without their consent or the acquisition of their title, but in the course of the opinion Judge EARL said: "If the Legislature had authorized a system of sewerage in the town of Flatlands for the convenience, health and welfare of the inhabitants of that town, and this sewer had been projected with lateral sewers with the privilege of the owners of adjacent lots to connect their lots therewith, then we are inclined to believe, for reasons we need not now state, that the character of the avenue and of the locality was such and the population is such that the sewer could be built in the avenue without the consent of the fee owners and without compensation to them. The

immediate benefits and advantages which they in common with the whole community might receive might be all the compensation to which they would be entitled."

Whitcher v. Holland Water Works Company, 66 Hun, 619, affirmed in the Court of Appeals without opinion, 142 N. Y. 626, was an action by an abutting owner to compel the removal of water pipes from a highway in an unincorporated village. The plaintiff's complaint was dismissed at the trial, and this ruling was sustained by the General Term of the Fifth Department on the ground that the highway was to be treated as an urban street, and, therefore, was subject to be used for the purpose of supplying water to the inhabitants.

In view of these decisions the question before us is not free from doubt. While that part of Judge EARL's opinion which I have quoted was entirely a dictum, the legal principle which he asserts is doubtless sustainable under the health and police powers of the Legislature. The decision in *Whitcher's* case, however, does, I think, sustain the contention that the streets in a populous community not incorporated as a city or village may be legally subjected to more extensive burdens than the ordinary country highway.

The court, in this case, excluded an offer to show that the part of the town which was included within the appellant's contract was a populous village, and if density of population is the test by which the question is to be determined, [this ruling was wrong, and the judgment must be reversed. Serious practical difficulties will, however, be encountered if the rights of abutting owners outside of cities and incorporated villages are to be dependent upon density of population. What is to be the line in respect to these easements which separate the urban from the rural district? Where do the more extensive urban easements begin and end? If we limit them to cities and incorporated villages the rule is simple,

and the right of every land owner in the streets is easily solved. If we extend them outside of the incorporated villages, the rights of no land owner is settled, but each case must be determined on its own facts, and the decisions will vary with the varying minds and judgments of courts and petit jurors.

The question as to the rights of an abutting owner in the street which bounds his property is one of law. The rule which controls it is a rule of property, and nothing can be plainer than that it should be certain and unvarying, and apply to all communities alike. Any community may incorporate into a village under our laws by a vote of its inhabitants, and in my judgment highways should not be treated as urban streets, and impressed with the more comprehensive public easements that exist in city streets unless they lie within a city or an incorporated village.

If any community desires to enjoy the benefits of urban life and impose upon its streets more extensive easements than exist in rural highways, let it incorporate itself into a village. But independent of this consideration, I think the case before us is controlled by the doctrine laid down in *Eels v. A. T. & T. Co.*, *supra*. That case in its facts is precisely like the case before us, except in respect to the use to be made of the poles and wires. The distinction would be shadowy, I think, that would support as a legal exercise of power the erection and maintenance of poles and wires which carried an electric current to light a lamp on a street, but denied the right to erect and maintain precisely the same things, because they carried a weaker current of electricity for the purpose of communication and the transmission of intelligence. The thing that is important to the rights of the land owner is the substantial physical structure on the surface of the highway. The use to which it is put is secondary and unimportant. If the question depends on the use, and courts are to distinguish between what is and what is not a proper street use, how

can we say that a telephone or telegraph line is not as much a street use as a water pipe? A sewer drains the highway. A gas pipe or an electric light wire serve to light the street, but a water pipe has no necessary connection with the street itself. Its use is to conduct water to the adjacent houses and serve to extinguish fires. But for the latter purpose it is useless without the fire engine or the fire department, and the wire which sounds the fire alarm or serves to summon assistance is as much a part of the system as the pipe which conducts the water. Indeed, the telephone and telegraph is as much of a necessity in modern life as any other of the conveniences which might fall under the designation of proper street uses. The *Eels*' case cannot be distinguished, therefore, from *Whitcher*'s case by saying that one represents a proper and the other an improper use of the street, and unless they can be distinguished on other grounds, the latter case must be deemed to be overruled. These two cases were argued within three months of each other, and it is to be regretted that in deciding the *Eels* case reference was not made to the decision in the *Whitcher* case. But while no reference was made to it by Judge PECKHAM in his opinion, it will be observed also that he makes no reference to the subject of proper street uses. This decision, as I have already stated, is placed solely upon the ground of the character of a rural highway and the legal rights of the public and the abutting owners therein. There is manifestly a very important physical difference affecting the rights of the public and the adjoining owners between the burden of an under ground easement and one which permits the erection of a structure above the surface. The right of uninterrupted passage which the public enjoys in the traveled part of a highway necessarily excludes the owners from all use and enjoyment of that part of the road. A pipe, which is laid under the ground, carries no permanent impairment to any public right on the surface or any

private right in the soil. On the side of the road the land owner has, however, substantial rights of property both in the surface and in the soil. In addition to the ordinary easements of light, air and access, he may, on a country highway, plant shade trees, cultivate the sides of the road, and do anything to improve or beautify it or his own property so long as his acts do not impair the public right of passage. *Jackson v. Hathaway*, 15 Johns. 447. The State not only invites him to plant trees, but it encourages him to do so by granting to those who do this a substantial reduction in their road tax. Chap. 371, Laws 1883; chap. 568, Laws 1890, sec. 44.

A pole which supports wires cannot, like the underground pipe, be placed in the roadway, nor can it stand on the sidewalk if there be such. From necessity it must be placed between the two or upon the side of the roadway where the owner has substantial rights. Unlike the lamp post, the hitching post or the hydrant, it does not occupy a small space, but carries wires along the whole length of the street. It not only interferes with growing trees, but it prevents the planting and growth of new ones. The structure is unsightly, and the electric current carried on the wires may become, through carelessness or accident, dangerous if not deadly, and it interferes (in a small degree, perhaps) with the access to the property. But it does interfere with and perhaps destroys the legal right of the owner to plant and grow shade trees and to use the side of the road, and the use made of the street is of a permanent and exclusive character. As was said in *Eels' case*, such a use is "wholly at war with that of the legitimate public easement in the highway."

This view of the distinction between underground easements and those which would permit the erection of poles and wires has support in the principle underlying the decisions in the elevated railway cases.

In *Craig v. Rochester City & Brighton Railroad Company*,

39 N. Y. 404, it was held that, when one owned to the center of a street, the laying of rails for a horse railroad imposed an additional burden on the land forming the street, for which the owner was entitled to compensation.

In *Kellinger v. Forty-second Street, etc., Railroad Company*, 50 N. Y. 206, such relief was denied to an owner who did not own the fee, on the ground that there was no taking of his property, and that the use made of the highway by the railroad was substantially the same as that made by other modes of travel. It was still a highway for passage and motion.

But in the elevated railroad cases, because the street was permanently and to some extent exclusively appropriated by the elevated railroad structures, it was held that their erection without the consent of the abutting owners was illegal. *Story v. New York Elevated Railroad Company*, 90 N. Y. 122; *Fobes v. Rome, Watertown & Ogdensburg Railroad Company*, 121 id. 505.

If the view here expressed as to the distinction between pipes beneath a highway and poles and wires above the surface is sound, then there is no conflict between Eels' case and *Whitcher's* case, and the case under consideration falls easily within the principle applied in the former decision, and the judgment must be affirmed.

Stress is laid by the learned counsel for the appellant on the fact that the right of the exercise of the power of eminent domain had not been conferred by the Legislature on electric companies, while it had been upon all corporations that were authorized by the Transportation Corporations Law. This omission has now been remedied (chap. 446, Laws 1896), and it is within the power of such corporations to acquire the right to erect their poles and wires in any of the streets and highways of the State.

It has never been decided in this State as yet, that the State or any corporation has the right to erect and maintain poles and wires upon a country highway for any

purpose without the consent of the abutting proprietors. And in view of the decision of the Court of Appeals in Eels' case, I am unwilling to adopt or apply the rule which attempts to distinguish between the use of the streets for different purposes. In my judgment the thing that is unlawful is the erection of the poles and wires without the land owner's consent or the acquisition of his title, and it is of no consequence to what use the pole and wire are to be put after they are erected. While I yield to the force of the decision in Witcher's case, I think any attempt to extend urban easements outside of incorporated villages will lead to confusion and introduce into the administration of the law a rule affecting property which will render uncertain the rights of every owner of lands abutting on a highway. While these rights are not of great pecuniary value, they are important to the enjoyment of property, and there has been as yet no reason suggested why they should be handed over to the electric corporations without compensation.

The judgment should be affirmed, with costs.

All concurred.

Judgment affirmed, with costs.

NOTE.—See note to *Thouron v. Schuylkill Elec. Ry. Co.*, post.

THE STATE, EMILY W. ROEBLING, Prosecutrix, Plaintiff in Error, v. TRENTON PASSENGER RAILROAD COMPANY (CONSOLIDATED), AND THE BOARD OF PUBLIC WORKS OF THE CITY OF TRENTON, Defendants in Error.

New Jersey Court of Errors and Appeals, June 15, 1896.

(58 N. J. 666.)

ELECTRIC STREET RAILWAY.—RIGHTS OF ABUTTING OWNERS.—CONSTITUTIONAL LAW.

The construction and maintenance of a trolley railway, with the necessary posts and wires, in a highway, the land to the center of which belongs to the abutting owner subject to the public easement, does not constitute a new servitude for which the abutting owner is entitled to compensation.

A statute which merely authorizes a street railway company to substitute electricity for horses as its motive power, upon first obtaining municipal authority; and empowers the municipal authorities to permit the maintenance in streets of the necessary poles and wires for such purposes, *held*, to relate only to the public easement, leaving the companies to obtain from land owners such private rights or property as they may require, and not to create an additional easement without compensation to the abutting owner; and not to be unconstitutional.

For any injury due to obstruction of the easements of light, air or access to his property or to vibrations caused by running heavy cars at great speed, the abutting owner has his remedy at law and should be remitted thereto.

APPEAL from judgment of Supreme Court in favor of defendant, upon a writ of *certiorari* to determine the validity of an ordinance.

Facts stated in opinion.

Charles E. Gummere, and *William M. Lanning* for plaintiff in error.

Joseph Coult and *James Buchanan*, for defendants in error.

DEPUE, J.: This writ brings up a judgment of the Supreme Court sustaining an ordinance entitled "An ordinance to authorize the Trenton Passenger Railway Company (Consolidated), to use electric motors as the propelling power of its cars through certain streets and avenues in the city of Trenton, and to provide for the erection of poles and the stringing of wires thereon to supply electricity to the motors," passed by the board of public works of the city of Trenton February 8th, 1894, and approved by the mayor February 12th, 1894.

The ordinance was passed in virtue of the act of 1893 (Pamph. L. p. 241; Gen. Stat. p. 3210).

The first section of that act authorizes street or horse railroad companies to use electric motors as the propelling power of their cars, instead of horses, provided consent of the municipal authorities be first obtained.

The second section empowers the municipal authorities to authorize the use of poles to be located in the public streets, with wires, etc., for the purpose of supplying the motors with electricity, and to prescribe the manner in which, and the places where, such poles should be located.

The ordinance is, in all respects, in compliance with this statute, so far as is material to this case, and is in conformity with the powers of the city government to regulate the use of public streets.

The prosecutrix is the owner of a lot on the southerly side of West State street, between Warren and Calhoun streets. Her title extends to the middle line of the street, subject to an easement in the public for the purposes of a public highway.

The reasons filed for setting aside this ordinance are:

First. Because the erection of poles and the stringing of wires thereon upon the lands of the prosecutrix, in West State street, in the city of Trenton, for the purpose of supplying electricity to the motors to be used by the Trenton Passenger Railway Company (Consolidated), in

propelling their cars over and along their railroad in said city, without the consent of the said prosecutrix, and without payment to her therefor, is in violation of the Constitution of the State of New Jersey, in that it is a taking of private property for public use by a private corporation without compensation first made to said prosecutrix, and therefore an ordinance authorizing the erection of such poles, and the stringing of wires thereon, for such purpose, without providing for compensation for land taken, is illegal and void.

Second. Because the construction and operation of an electric railroad in the public streets of Trenton, upon the lands of the prosecutrix therein, without her consent, and without payment to her therefor, is in violation of the Constitution of the State of New Jersey, in that it is a taking of private property for public use by a private corporation without compensation first made to the said prosecutrix, and, therefore, an ordinance authorizing the construction and operation of such a railroad, without providing for compensation for land taken, is illegal and void.

Third. Because the said ordinance is unreasonable, so far as it authorizes and permits the construction and operation of a double tracked electric railway, to be operated by what is known as the trolley system, upon West State street, between Warren and Calhoun streets, in the city of Trenton.

The ordinance, in prescribing the places in which the company's poles should be located, fixed the location of two of its poles on the sidewalk in front of the property of the prosecutrix, just inside of the curb line, and the company has erected these two poles at the places indicated. The evidence shows that the cars used by the company weigh seven and one-half tons, and are thirty feet in length, and that ordinary horse cars weigh one and one-half tons, and are fourteen feet in length, and that the speed with which the company runs its cars in the section

of the street on which the property of the prosecutrix is located is from seven and one-half to seventeen miles per hour, with a mean average speed, on the forty-six trips observed, of twelve miles per hour. There is also evidence in the depositions that by reason of the weight of the cars, and the speed at which they are run, they occasion, at times, vibrations to the extent of rattling the windows in the dwellings fronting on the street.

The prosecutrix's standing in this proceeding is that of the owner of property complaining of an invasion of her property rights. The ordinance being in compliance with the statute, the question is whether the Act of 1893 is within the power of the Legislature.

In considering this question it must be admitted, at the outset, that the transmission of passengers with increased speed and greater comfort is a great public benefit. This is equally true of the lines of railroads that traverse our State and penetrate into every section, and of the diversion of waters to create waterways for carrying freight, or to supply water for use in the large cities and towns. It is also conceded that the erection of poles with wires strung thereon, in the present state of the sciences, is necessary to accomplish the purposes contemplated by this legislative provision. But no considerations of public advantage should be permitted to predominate over the rights of private property, which, by a constitutional inhibition, cannot be taken for a public use without compensation.

As was said by Chancellor GREEN in *Hinchman v. Patterson Horse Railroad Co.*, 2 C. E. Gr. 75, 80: "Nothing can be claimed on the ground that city railroads are a great public convenience and benefit; if they are so, the public can afford to pay for it; that is certainly no reason why individual property should be taken for public use." This constitutional provision has uniformly been liberally construed for the protection of private property. Not only an actual taking, but also the destruction of private

property, either total or partial, or the diminution of its value by the act of the government, directly and not merely incidentally affecting it, which deprives the owner of the ordinary use of it, is a taking, within the constitutional provision, which can only be exercised under the right of eminent domain, on just compensation made. *Trenton Water-Power Co. v. Raff*, 7 Vroom. 335; *Pennsylvania Railroad Co. v. Angel*, 14 Stew. Eq. 316, 329.

The title to the soil over which highways and streets are laid remains in the owner of the fee, subject only to the public easement. "The right of the public in a highway," said Chief Justice BEASLEY in *State v. Laverack*, 5 Vroom. 206, "consists in the privilege of passage, and such privileges as are annexed as incidents by usage or custom, as the right to make sewers and drains, and lay gas and water pipes; the subordinate privileges are entirely consistent with the primary use of the highway, and are no detriment to the land owner." This principle has been extended to the use of streets in populous districts, to appliances for distributing water, light, heat, power and matters of general necessity or convenience. *Lew. Em. Dom. sec. 126*. In *Stoudinger v. Newark*, 1 Stew. Eq. 187, S. C. id. 446, it was held, against the land owner's objection, that the use of the street for sewers was a legitimate use, consistent with the purpose for which the land was appropriated. The uses of the streets for such and similar local and public benefits have, from an early period in municipal governments, been so usual and customary as that they may be regarded as having been in contemplation when the streets were laid out or dedicated as servitudes upon lands within and abutting upon streets, to be put in force as occasions arise for their use, which confer a benefit immediately upon the adjacent lands. But it is not every use of a public street that is lawful, as against the rights of the owner of the fee, though such use may promote public benefit. Thus it was held in *State v.*

Laverack, that the Legislature had not the power, under the Constitution of this State, to authorize a market to be held in a public street of a city without providing compensation to the proprietors of the contiguous lands, who owned to the center of such street, notwithstanding that such market was designed for public use, and inured to a public benefit. In *Starr v. Camden and Atlantic Railroad Co.*, 4 Zab. 592, the subject was discussed by Mr. Justice HAINES, who explicitly held that the Constitution of this State prevented the Legislature from granting to a railroad the right to use a public highway as the bed of its railroad, without compensation to the owner of the soil, and his opinion on that head has uniformly and frequently been adopted as a correct exposition of the constitutional right of the owner of the soil within public highways. In both the cases cited the prosecution was at the instance of the owner of abutting lands, whose title extended to the center line of the highway.

In *Hinchman v. Paterson Horse Railroad Co.*, 2 C. E. Gr. 75, the power of the Legislature to authorize the use of a public street for street railways was directly under consideration. The bill was filed by owners of lots abutting upon the street, having title to the middle of the street, to enjoin a horse railroad company from the construction of its railroad through the street under the authority of its act of incorporation. Chancellor GREEN, in his opinion, quoted with approbation the opinion of Mr. Justice HAINES in *Starr v. Camden and Atlantic Railroad Co.*, and affirmed the incapacity of the Legislature, under our Constitution, to appropriate lands within public highways to any other than their legitimate use as highways without compensation to the owners of the soil. The learned Chancellor distinguished the use of a street for a horse railroad from its use by an ordinary railroad, and justified the use of part of the highway for street railroads in this language: "They are ordinarily, as in this case, required to be laid

level with the surface of the street, in conformity with existing grades. No excavations or embankments to affect the land are authorized or permitted. The use of the road is nearly identical with that of the ordinary highway. The motive power is the same. The noise and jarring of the street by the cars is not greater, and ordinarily less, than that produced by omnibuses and other vehicles in ordinary use. Admit that the nature of the use, as respects the traveling public, is somewhat variant; how does it prejudice the land owner? Is his property taken? Are his rights as a landholder affected? Does it interfere with the use of his property any more than an ordinary highway?" It will also be observed that the Chancellor, in his subsequent language, expressly repudiated the idea that the rights of landowners in the premises could be affected by the fact that city railroads were a great public convenience.

The extract made from the opinion of the learned Chancellor has frequently been referred to with approval by the courts of this State. The ground of the Chancellor's decision denying the injunction was that the complainant's rights as owners of lands were not in fact 'prejudiced or interfered with by the use of the streets by a street railroad operated in the manner in which the railroad in question was authorized to be operated, to a greater degree than they would be affected by their use, as an ordinary highway; in other words, that the mode in which the company was authorized by its charter to use the streets of the city in fact created no additional servitude upon the lands.

The defendant was incorporated as a "horse railroad company," with power to lay rails and operate a railroad through Clinton and State streets, in the city of Trenton. (Pamph. L. 1859, p. 266.) The act of 1893, and the consent of the city authorities, by the ordinance, authorized the company to substitute electric motors in the place of horses, as the propelling power of its cars. Neither the

statute of 1893, nor the ordinance, conferred upon the company any rights beyond those vested in it by its charter, except in allowing a change in the motive power to be applied to its cars. The change in the motive power of the cars did not necessarily occasion any injurious effects upon the prosecutrix's property. Cars of the same pattern and size of the cars used by the company as a horse railroad, and driven with no greater speed, might have been adapted to the new motive power. I agree with those cases in our courts which hold that the substitution of electric motors with the trolley system for horses on street railroads does not *per se* create an additional easement. The injury to property which would give the prosecutrix a legal ground of complaint does not spring from the kind of motors used.

The statute also empowers the municipal authorities to authorize the use of poles in the streets, with wires thereon to supply the motors with electricity, and to prescribe the places in which such poles should be located. Two of these poles were located by the ordinance on the complainant's lands, on the sidewalk, inside of the curb. Holes were dug and poles were set in the ground by the company at the places indicated by the ordinance.

The contention of the prosecutrix is that the setting of these poles on her lands constituted a permanent, exclusive and continuous use of her lands, not within the customary and legitimate use of the lands of abutting owners on a public way, and was to that extent a taking of private property such as is interdicted by the Constitution, except upon just compensation made, and that an ordinance authorizing the erection of poles, and the stringing of wires thereon, for the purpose of supplying the company's motors with electricity, without providing for land taken, is illegal and void.

The statute which underlies this ordinance does not confer upon these companies the right to acquire private

property by the exercise of the right of eminent domain. By that act the legislative purpose was to confer upon these companies the right to erect poles and use the trolley system, so far as the public easement was concerned, and made it the duty of the municipal government to fix and designate the location of the poles with a view to the public convenience in the use of the streets; leaving the several companies, if their necessities or convenience require the appropriation of private property, to obtain the consent of landowners by agreement. In withholding the power of eminent domain, the Legislature intended that, if private property was necessary or desirable, these companies should acquire rights in private property by the consent of the owners, and not take it *in invito*. The act, in withholding the power of condemnation, may not effectuate all that these companies, in particular instances, desire for the scheme of improvement they have embarked upon; but the act, by its imperfection in this respect, is not rendered wholly void.

Injuries by vibrations caused by the weight of the cars of the company, combined with the speed at which they were run, belong to the same class of injuries as that which may arise from the setting of poles. The owner of lands abutting upon a street holds his title subject to the inconveniences and injurious consequences, including those occasioned by noise and vibration, resulting from a user which is consistent with the legitimate and proper use to which these public thoroughfares are devoted. But such injuries as are caused by a manner or mode of user which is not justifiable on the ground that the *locus in quo* is a public street will lay the foundation for, and are redressable by, action. In *Beseman v. Pennsylvania Railroad Co.*, 21 Vroom. 235; S. C. 23 id. 221, the immunity of a corporation exercising public franchises from liability for incidental damages occasioned to abutting lands was
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limited to such damages as were occasioned by the exercise of its franchises with care and skill in all respects. Neither the act of 1893, nor the ordinance under review, purported to legalize the size or weight of cars to be provided by the company, nor the speed at which they should be run. The privileges granted were capable of being employed without an excessive or unusual injury to lands abutting upon the streets.

If any of the privileges granted by this statute are made the occasion for unlawfully injuring the owners of abutting property, such acts of the company are *ultra vires*, and redressable by action at the suit of the injured party.

The act of the Legislature is a general law for the equipment of street railways throughout the State, and the ordinance under review is, in those respects which are material to this controversy, similar to the ordinances under which many street railways have been equipped and are operated. A decision that such ordinances, and the statute under which they were made, were invalid, for the reason that, in a particular case before the court, it should appear that these privileges have been made the occasion for unlawfully injuring private property, when such injury was not the direct product of the ordinance, would be disastrous to public interests, and not warranted in law. For such injuries, the remedy of the party injured is by action. If the acts done under color of the ordinance or the statute be found to be an unlawful invasion of the rights of private property, an action will lie, in which neither the ordinance nor the statute would be a justification. *Costigan v. Pennsylvania Railroad Co.*, 25 Vroom. 234, 239, 240.

The remaining reason assigned for setting aside this ordinance is that it is unreasonable, so far as it authorizes and permits the construction and operation of a double track railway to be operated by the trolley system upon West State street between Warren and Calhoun streets.

The title of the ordinance relates solely to the use of electric motors, and the erection of poles with wires thereon to supply electricity to the motors. The permission granted to the company is to use their motors and appliances "on its tracks, which are hereby authorized to be laid," enumerating certain streets, among which is State street, from the easterly limits to the westerly limits of the city. The ordinance recognizes double and single tracks, which were probably laid under the authority of the company's original charter. Be that as it may, nothing appears in the case to show that there is anything in the situation of West State street, either in its width or surroundings, that makes a double track in the street, with cars operated by the trolley system, in itself injurious or unreasonable, either with respect to the public convenience or to private property. Nor does it appear that the track of the company's railroad next to the property of the prosecutrix has been placed so near the curb line as unreasonably to interfere with access to her property, or the enjoyment of those privileges which owners of abutting lands are entitled to enjoy in a public highway in front of their premises.

The ordinance, in its second section, reserves to the board of public works the right to make reasonable regulations governing, among other things, the number of cars in a train, and in the sixth subdivision of the nineteenth section, trail cars are mentioned. Under these sections the company appear to claim a right to run trains made up of a motor car and one or more connected passenger cars, called trailers. Trains so made up were run during the State fair as through trains to the fair grounds, with instructions to the company's employees not to carry local passengers. It may be difficult to justify such a use of the streets upon the theory upon which the use of streets for street railways has been justified as a legitimate use. But there is no reason assigned which brings this part of the ordinance under review.

Finding no infirmity in the ordinance, or in the statute in virtue of which it was passed, within the reasons assigned for setting aside the ordinance, I think the judgment of the Supreme Court sustaining it should be affirmed.

For affirmance—The CHANCELLOR, DEPUE, DIXON, LIPPINCOTT, BARKALOW, BOGEET, HENDRICKSON, NIXON, 8.

For reversal—None.

NOTE.—See note to *Thouven case*, *post*.

HARRIET W. CLARK, Respondent, v. MIDDLETOWN-GOSHEN
TRACTION COMPANY, Appellant.

New York Supreme Court, Appellate Division, Second Dept., Nov., 1896.

(10 App. Div. 354.)

ELECTRIC STREET RAILWAY.—RIGHT OF ADJUTING OWNER.

A person who owns the fee of a street in front of her premises is entitled to compensation for the occupation and use of the street for a trolley railway.

APPEAL by defendant from judgment of Supreme Court in favor of plaintiff, rendered at Special Term, Orange County. Facts stated in opinion.

Albert Reynaud, William F. O'Neill and Henry W. Wiggins, for the appellant.

George T. Clark, for the respondent.

PER CURIAM: The judgment appealed from perpetually enjoins the defendant from maintaining its tracks and operating its street railway in the city of Middletown in front of the plaintiff's premises, until such time as the defendant shall have paid to the plaintiff the sum of \$750, being the amount of permanent loss and damage to such premises sustained by reason of the location of the defend-

ant's track and the operation of its railway in front of such property. It is in the usual form of judgments in elevated railroad cases in New York and Brooklyn, where the easements of abutting owners have been injuriously affected by the structure in the street. The plaintiff is the owner of the fee of the street in front of her property, and under the authority of *Craig v. Rochester, etc., R. R. Co.*, 39 N. Y. 404, the occupation and use of the street by the defendant for its trolley railroad clearly entitled her to compensation. The court at Special Term held, upon evidence sufficient to support the finding, that the plaintiff's property had been injured by the proximity of the rail to the curb, which prevented her premises from participating in the advantage which they would otherwise have received from the general enhancement of property values in Middletown. The learned counsel for the appellant, in their brief, assume that the trial judge, in what he said about the enhancement which comes from the construction of public improvements, referred to the appreciation of values occasioned by the construction and operation of the railroad itself; but we think it is plain that such was not his meaning, especially when reference is had to the testimony on the subject. That he meant a general increase, independent of the existence of the railroad, is shown by this extract from the testimony of a witness in respect to values: "The Court: Q. Suppose the railroad had not been built, I understand you to say that the property appreciated in value? A. Yes, sir. The property was enhancing in value before the railroad was built out that way. I think the railroad has depreciated the stores for renting purposes. It would be harder to rent now than it was before."

The judgment must be affirmed, with costs.

All concurred, except BROWN, P. J. not voting.

Judgment affirmed, with costs.

NICHOLAS THOURON, AS TRUSTEE OF THE ESTATE OF
NICHOLAS E. THOURON, deceased, v. SCHUYLKILL ELEC-
TRIC RAILWAY COMPANY AND ANOTHER.

Pennsylvania Supreme Court, March 10, 1896.

TROLLEY WIRES IN HIGHWAY.—ABUTTING OWNER.—INJUNCTION.

Preliminary injunction to prevent construction of electric street railway on plaintiff's land, *held* properly vacated, there being doubt as to the fact of its being on his land.

APPEAL from order of Court of Common Pleas, Schuyl-kill county. Facts indicated in head-note and opinion.

J. Lineaweaver, for appellant.

R. H. Koch, for appellees.

PER CURIAM: As we understand the record, the first assignment of error is broader than the decree, in that it complains of the dismissal of "the bill" as well as dissolution of "the preliminary injunction." Dismissal of the bill is not included in, nor does it form any part of, the decree dissolving the injunction. As to the latter, which is the only question before us, we are not convinced that the learned court committed any error. The burden of proof was on the plaintiff, and the evidence on which he relied was too vague and unsatisfactory to have justified a continuance of the injunction until final hearing. In the concluding sentences of his opinion the learned judge rightly says: "We feel compelled to dissolve this injunction upon the ground that the complainant has not sufficiently shown that the electric road is being built upon the Thouron tract; or, at least, the testimony submitted

leaves it a matter of grave doubt, and we may not guess, as to the street line, and proposed location with reference thereto, and then make the guess the basis of an injunction." There appears to be nothing in the record that would justify us in sustaining either of the specifications, nor do they present any question that requires discussion. Decree affirmed, and appeal dismissed, with costs to be paid by the plaintiff.

NOTE.—In *Haskell v. Denver Tramway Company*, Colorado Supreme Court, May 18, 1896 (46 Pac. Rep. 121), held, that in Denver, where the fee of the streets is in the city in trust for the use of the public, an injunction will not be granted to an abutting owner to enjoin the laying of a street railway on the ground that it will impair his easement of ingress and egress, since he has a remedy in damages.

In Illinois, it is provided by statute that municipal corporations may grant the use of streets to street railways only in case a majority of the frontage of the abutting property owners have first consented. In view of this statute, it is held, in *Beeson v. City of Chicago et al.*, U. S. Circuit Court, Northern District of Illinois, June 20, 1896 (75 Fed. Rep. 880), that in default of such consent the abutting owner is entitled to injunction restraining such use.

The question whether abutting owners are entitled to compensation for the use of streets for electrical purposes is one as to which the courts of different States are not yet in harmony.

Earlier decisions upon this subject may be found collated in notes, vol. 8, p. 348; vol. 4, p. 218 and vol. 5, p. 185, of this series.

As to the cases reported in the present volume :

In Pennsylvania, the District Court decided, in *York Telephone Company v. Keesey*, p. 107, that the telephone imposes no new burden. This was upon the authority of *Lockhart v. Craig St. Ry. Co.*, 8 Am. Electl. Cas. 314, the telephone and the trolley railway uses being treated as in this respect analogous. It may be useful to observe that this decision would undoubtedly be limited to streets of municipal corporations, for in *Penna. R. Co. v. Montgomery Co. Pass. Ry. Co.*, 5 Am. Electl. Cas. 166, it was held by the Supreme Court that in rural highways the trolley railway imposes a new servitude.

In New Jersey, it is provided by statute that telephone poles shall not be erected in streets without the written consent of abutting owners; who are therefore in position to demand compensation before giving such consent (*State, Marshall, Pros. v. Bayonne, ante*, p. 108).

In New York, it had been established by earlier cases that for the use of rural highways for telephone and telegraph purposes the abutting owner is entitled to compensation; and the cases here reported (*Postal*

Bradley v. Telephone Co.

Tel. Cable Co. v. Bruen, ante, p. 120, and *Blashfield v. Empire State Teleph. & Tel. Co.*, ante, p. 126), relate only to questions of measure and amount of such compensation.

In *Palmer v. Larchmont Electric Company*, ante, p. 128, the Appellate Division of the New York Supreme Court decide that there is such analogy between telegraph and electric light uses, that from the decision of the *Eels' case* (5 Am. Electl. Cas. 92), by the Court of Appeals it follows necessarily that the use of a highway by an electric light company also creates a new servitude.

It is held in New Jersey (*State, Roebling, Pros. v. Trenton Pass. R. Co.*, ante, p. 187), that the use of a highway by a trolley railway does not, and in New York (*Clark v. Middletown-Goshen Traction Co.*, ante, p. 148), that it does, entitle the abutting owner to compensation.

CAROLINE L. BRADLEY V. THE SOUTHERN NEW ENGLAND
TELEPHONE COMPANY.

Connecticut Supreme Court of Errors, July 24, 1895.

(66 Conn. 559.)

TELEPHONE WIRES.—MUNICIPAL CONTROL.—CUTTING TREES.—CONFLICT
OF STATUTES.

A board of town selectmen cannot, either by virtue of statutory power to direct the location of telephone poles and wires, or by virtue of statutory power over the location of electric street railways, and the incidental power, if it exist, to compel a telephone company to change the location of its line so as to prevent interference with the wires of a railway, authorize the cutting of trees by a telephone company, without the consent of the owner, such cutting being forbidden to such companies by earlier statutes than those conferring the aforesaid powers upon the selectmen.

APPEAL by defendant below from judgment of Superior Court, New Haven county.

John W. Alling and James T. Moran, for the appellant.

Edward H. Rogers, for the appellees.

TORRANCE, J.: The complaint in this case alleges that the defendant wrongfully entered upon the land of the plaintiffs, and cut and trimmed six trees growing thereon. The defendant filed three answers, the first being a general denial, and the second and third setting up certain facts in justification of the trespass charged. The case was tried to the jury, there was a verdict for the plaintiffs, and from the judgment upon the verdict the present appeal is brought.

The acts upon which the questions raised by the appeal depend may be stated as follows:

The land on which the trees stood is bounded on a public highway, and it lies partly in New Haven and partly in East Haven. The six trees in question stood just within the fence line adjoining the highway, four of them being on the New Haven part of the land, and two of them on the East Haven part, and their branches, to some extent, overhung the highway.

The defendant is a corporation created by the Legislature of this State, and authorized by its charter to construct and maintain telephone lines, including poles, wires and necessary fixtures, upon any highway of this State. It had, before the date of the alleged trespass, constructed a telephone line along the east side of the highway which bounded the plaintiff's land, and was then operating the same.

On the 22nd of May, 1894, the selectmen of East Haven issued the following document to the defendant: "Whereas, in the construction of the line of the New Haven Street Railway Company, certain telephone poles and wires interfere with the running and operation of the electrical conductors and cars of said company, and it is necessary that said telephone poles and wires should be removed and relocated; now, therefore, we, the undersigned, selectmen of the town of East Haven, having, under the statutes of the State, direction and control over

the placing, removal, and relocation of structures upon the highways of towns, for the purpose of securing a proper construction of such railway, hereby order, direct and permit the removal and relocation by the Southern New England Telephone Company of sundry telephone poles and wires now located upon the lay out of said railroad in said town of East Haven, and to trim such trees upon said highway as may be necessary, for a distance of one foot from the outside wire of said line, according to the diagram hereto attached, and in accordance with the following detail, to wit: On the west side of Main street, from the town line southeasterly to road known as Horse Cart way, first north of town hall."

On the same day the selectmen of New Haven issued to the defendant a document in substantially the same language, respecting that part of the defendant's telephone line in New Haven which it was deemed necessary to change in the construction of the railway.

Under these documents the defendant removed its line of poles, then standing on the east side of the highway aforesaid, to the west side of the same, and relocated its poles along said west side at the points designated by the selectmen. In so doing, some of them were placed in the highway adjoining the plaintiff's premises, and, to permit the erection of the defendant's poles and wires at this point, the defendant cut and trimmed the six trees in question. In its second answer the defendant justified under these two documents issued by the selectmen as aforesaid. In its third answer it justified on the ground, in substance, that the parts of said trees cut and trimmed off were an obstruction and a nuisance to the public, in the use of the highway, and more especially to the defendant, in the construction and erection of its poles and wires at this point.

The controlling question in the case relates to the power of the selectmen, under the circumstances, to authorize the cutting and trimming of these trees; for, if they

possessed such a power, then the facts set up in the second answer, if true, would be a complete justification, independently of the other facts set up in the third answer, and, if they did not possess it, then we think the defendant could not justify under the other facts set up in the third answer, for the reasons hereinafter stated.

As this power, if it existed at all in the selectmen, was given to them by statute, it will be necessary to examine the statutes under which it is, or may be, fairly claimed such power was conferred; and, in connection with that examination, it will simplify matters, perhaps, to look first at the statutes which prohibit the cutting and injuring of trees, without the consent of the owner, by companies who are authorized to maintain electrical wires or fixtures of any kind on the public highways.

The statute under which the defendant in June, 1894, maintained its telephone line upon the highway in question, reads as follows: "Every telegraph or telephone company may maintain and construct lines of telegraph or telephone upon any highway, or across any waters in this State, by the maintenance and erection of the necessary fixtures, including posts, piers or abutments for sustaining wires; but the same shall not be so constructed as to incommode public travel or navigation, nor to injure any tree without the consent of the owner." General Statutes, sec. 3944.

The prohibition contained in this section, against injuring trees without the consent of the owner, was first passed in 1860. Public Acts of 1860, c. 66. And it has remained upon the statute book ever since. In addition to this prohibition, sec. 1477 of the General Statutes provides that every person who shall wilfully injure any tree in a highway "for any purpose connected with the erection or maintenance of any telegraph, telephone or electric light or power wires or fixtures, without the consent of the adjoining proprietor," shall be subject to fine and imprisonment; and sec. 1759 provides that "no telegraph, telephone

or electric light or power company shall cause to be cut down or injured any tree growing on the highway, for the purpose of constructing or maintaining any electrical wires or fixtures of any kind without the written consent of the adjoining proprietor," under penalty of a fine, and, in default of payment, imprisonment.

Under these provisions, it is quite clear that the defendant, upon its own authority, could not lawfully injure the trees in question, without the consent of the plaintiffs, either for the purpose of locating its line at this point originally, or of shifting and changing part of its line to this point from some other where it had been originally placed; and, indeed, the defendant makes no claim of this kind. What it does claim is that the selectmen had the power to compel it to change the location of its wires as ordered, and, as incidental to this, had the power to cut and trim the trees in question, which power to cut and trim the selectmen could and did delegate to it.

Assuming, for the purpose of the argument, that the selectmen could and did delegate such power to the defendant if they possessed it, the important question is, did they themselves possess it? Section 3945 of the General Statutes provides that no telephone company, "nor any company or association engaged in distributing electricity by wires or similar conductors, or in using an electric wire or conductor for any purpose, may hereafter exercise any of the powers which may have been conferred upon it to erect or place wires, conductors, fixtures, structures or apparatus of any kind over, on or under any highway or public ground or to change the location of the same without the consent of the adjoining proprietors, or in case such consent cannot be obtained, without the consent in writing of two of the county commissioners of the county in which it is desired to exercise said powers."

The next section (3946) provides that the selectmen in their towns, but not in cities or boroughs, shall, subject to

the provisions of the preceding section, "have full direction and control over the placing, erection and maintenance of any such wires, conductors, fixtures, structures or apparatus, including the relocating or removal of the same . . . and may make all orders necessary to the exercise of such power of direction and control," etc. Section two of chapter 169 of the Public Acts of 1893, so far as it is applicable to towns alone, provides that before any street railway company shall proceed to construct its railway, or lay additional tracks, or change its motive power, in a town, it shall cause a plan thereof to be made, as prescribed in said section, and presented to the selectmen of such town for their acceptance and adoption, either as originally made, or as modified after a hearing had thereon. Section three of the same act provides that the selectmen shall have "exclusive direction over the placing or locating of any tracks, wires, conductors, fixtures, structures of any such railway permanently located in the streets or highways, including the re-locating or removal of the same, or changes in the grade thereof, and for the purposes of any public improvement and including the power of designating the material, quality, and finish thereof, may make all orders necessary to the exercise of such power of direction and control, which orders shall be in writing," etc.

Under this act of 1893 the street railway company mentioned in the record made a plan as prescribed by the act, and presented it to the selectmen of New Haven and of East Haven, who accepted and adopted it. It was for the purpose of enabling said street railway company to build its road according to said plan that the selectmen of both towns issued the two documents to the defendant under which it attempts to justify the cutting and trimming of the trees in question, in its second answer.

If we assume, for the sake of the argument, that the selectmen had the power, under sec. 3946 of the General

Statutes, or under section three of the act of 1893, or under both, to order the defendant to remove and relocate its poles and wires for the purpose indicated in said documents, the question still remains whether they, in order to accomplish this purpose, had the power to injure these trees without the consent of the plaintiffs, and we think they had not. The power given to them by sec. 3946, to direct where the poles and wires of a telephone company shall be placed at the time of the original location of the line, is, we think, given to them subject to the prohibitions not to injure trees without the consent of the owner, contained in secs. 1477, 1759 and 3944 of the General Statutes, already quoted. Section 3946 does not repeal these other sections expressly, nor do we think it does so by implication. They all may well stand together, and, if this be true as to an original location, we think it is equally true of a relocation, as here.

Nor do we think that the powers of the selectmen are enlarged in this respect by the act of 1893. That act does not purport to enlarge in any way the powers of selectmen over telephone companies; neither does it expressly, or by any necessary implication, repeal the sections of the General Statutes aforesaid, prohibiting injury to trees without the owner's consent. We see no necessary inconsistency between those sections and the act of 1893, and they may well stand together.

This construction gives due force and effect to all the statutes in question, and, as it seems to us, is the only one which can be put upon them as a whole. If any insuperable difficulty arises from this construction, the remedy must be furnished by the Legislature, and not by the courts. At present, however, we do not well see how any such difficulty can arise. Our conclusion is that the selectmen had no power, without the plaintiff's consent, to cut or trim the trees in question, to enable the telephone company to erect or operate its line in the new location;

and consequently they did not, and could not, delegate that power to the defendant. In this view of the matter, the rulings of court upon the evidence, and its charge to the jury upon the defense made by and under the second answer, as they appear of record, were correct.

Under its third answer, the defendant's claim, in substance, was that the branches cut were an obstruction, and a nuisance which prevented the defendant from erecting and operating its line in the new location, and that it had, therefore, a right to cut them, under the circumstances.

Its right to use the highway at all, for the purpose of erecting and operating a telephone line, is given, as we have seen, by statute, and it is given expressly on condition that it shall not be exercised so as to "injure any tree without the consent of the owner." If the construction hereinbefore put upon the statutes which we have been considering is correct, the facts set up in the third answer, even if true, furnished no justification for cutting and trimming the six trees.

There is no error.

In this opinion the other judges concurred.

NOTE.— See note to next case.

SOUTHERN BELL TELEPHONE & TELEGRAPH COMPANY V.
DORA P. FRANCIS.

SAME V. SUSAN J. ALLEN AND OTHERS.

Alabama Supreme Court, Feb. 14, 1896.

TELEPHONE LINES.—RIGHTS OF ABUTTING OWNERS.—CUTTING TREES.

A telephone company, invested by statute with the right of eminent domain, and authorized by law to maintain poles and wires in the streets of a city, having been directed by the municipal authorities to remove its poles from the street to the sidewalk, and having found it necessary for that purpose to trim certain branches from trees, did such trimming with the consent of the city and under the superintendence of one of its officers.

Held, that an action of trespass could not be maintained by the abutting owner against the telephone company for such act.

This, irrespective of the question whether or not a telephone service constitutes an additional burden; and assuming that the abutting owner owns the fee of the land to the center of the street.

The ownership of the trees by the abutting owner is a qualified and limited ownership, subordinate to the rights, powers and duties of the governing municipal body in the protection, promotion and establishing of all public uses.

Telephone poles, especially when they also support a fire alarm telegraph wire, are devoted to a public use.

If such cutting were done without necessity, or in excess of necessity, the abutting owner would have a right of action, not in trespass, but in case for damages.

APPEAL by defendant below from judgment of City Court of Birmingham.

Facts stated in opinion.

Hewitt, Walker & Porter, for appellant.

Talioferro & Houghton, for appellee Francis.

Altmen & McQueen, for appellee Allen.

THORINGTON, J.: These two cases arise from substantially the same state of facts, and were submitted together in this court. Appellees, being the owners of property abutting on a public street in the city of Birmingham, brought suit in trespass against appellant to recover damages for injury to their property resulting from the act of appellant's agents or servants in cutting and trimming certain trees growing on the sidewalk in front of appellees' lots, which in one case had been planted by appellee some years ago, and in the other case it does not appear by whom they were planted. Appellant, a corporation invested with the right of eminent domain under the laws of this State, and authorized by law to erect poles and stretch wires thereon through the streets of Birmingham, was required by an ordinance of that city to remove certain of its poles and wires from the street on which appellees' property is situated, and to place them on the sidewalk in front of such property. Appellant claims that, in order to comply with this ordinance, it became necessary to cut and remove many of the limbs of the trees which had entwined themselves about the wires, and also to cut other limbs, in order that the trees should not interfere with the wires after the poles were removed to the sidewalk and the wires suspended over the tops of the trees; that, on ascertaining this to be necessary, it so informed the mayor of the city, who promised to obtain the consent of the property owners; that afterwards, and without having obtained such consent, as appellees were informed at the time, the mayor sent an officer of the city fire department to superintend the trimming of the trees, and under his direction the work was done by appellant's employes. Besides the appellant's wires on the poles there was also a fire alarm telegraph wire, which was the property of the city, and used in connection with the fire department. It was also removed with the poles and

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appellant's wires. Its position on the poles was underneath appellant's wires, and the testimony tends to show it was this wire mainly that necessitated the cutting of the trees. The cases were tried before a judge of the City Court, without a jury, and judgments were rendered in both cases for appellees, who were plaintiffs in the court below. The measure of damages adopted by the City Court was the difference between the market value of the lots abutting on the street before the trees were mutilated by the alleged reckless cutting and their value after such cutting. The appeal is taken pursuant to the statute creating said court, and brings the whole case before us for review.

The two controlling questions are: First. Whether an action of trespass lies in favor of appellees, as owners of the lots abutting on the street where the trees are standing, against appellant, for the acts of its employes in cutting the trees. Second. If such liability was incurred, what is the measure of damages?

Appellant's counsel have filed an interesting and elaborate argument in support of the proposition that a telephone service does not constitute an additional burden on the public streets of a city, and they cite numerous cases which are ably reasoned; but, in our opinion, the decision of the cases presented by these appeals for our consideration does not turn on that question, and we, therefore, leave it undecided. Other principles to which we will presently advert must govern our conclusions.

The owner of property abutting on a public street in the city, in the absence of statutory provisions to the contrary at the time of the dedication, or of a different intention appearing from the instrument or act of dedication, owns the fee in the land to the center of such street, subject to the public easement. *Western Ry. Co. v. Alabama Grand Trunk Ry. Co.* (at present term) 19 South.—; *Evans v. Railway Co.*, 90 Ala. 54;

Moore v. Johnston, 87 Ala. 220; *Railway Co. v. Witherow*, 82 Ala. 190; *Perry v. Railway Co.*, 55 Ala. 413; 5 Am. & Eng. Enc. Law, 405. And, in the absence of proof to the contrary, the presumption of law is that the fee to the center of the street is in the owner of the abutting property. *Lice v. County of Worcester*, 11 Gray, 283; *Railway Co. v. Rodel*, 46 Am. Rep. 164; *Weller v. McCormick* (N. J. Sup.), 1 Atl. Rep. 516; *City of Boston v. Richardson*, 13 Allen, 146. When such ownership is of the ultimate fee in land constituting a public country road, it has generally been recognized as retaining with it, subject to the easement of passage and its incidents and for purposes of repairs, the right to the earth, timber and grass growing between the center line of the road and the boundary of the owner's lands along the road, as well as all minerals, quarries and springs below the surface; and such owner may maintain actions against those who interfere with these rights. But, in respect of streets in populous places, it has been said, and we think with obvious reason, that the public convenience requires more than the mere right to pass over and upon them, and that the uses to which they may legitimately be put are greater and more numerous than those which may be applied to ordinary roads or highways in the country. Mr. Dillon, in his work on Municipal Corporations, in speaking of municipal control over public streets, uses the following language: "Whether the municipal corporation holds the fee of the street or not, the true doctrine is that the municipal authorities may, under the usual powers given them, do all acts appropriate or incidental to the beneficial use of the street by the public, of which, when not done in an improper and negligent manner, the adjoining freeholder cannot complain." In this State, however, that doctrine must be accepted as limited and controlled by the constitutional provision requiring municipal and other corporations invested with the right of eminent domain to

make just compensation for property taken, injured or destroyed by the construction or enlargement of its works, highways or improvements. Const. Ala., art. 14, Sec. 7; *City Council of Montgomery v. Townsend*, 80 Ala. 489; Id. 84 Ala. 478, *City Council v. Maddox*, 89 Ala. 181. Although it should be conceded that the posts and wires comprising a telegraph and telephone service are an additional burden on the street, for which compensation must be made to the owner of the abutting property, the city, if it have legislative authority for that purpose, may grant the right to such a company to use the public streets for its business in common with, and without obstructing, the use of such street by the public. Concurrent legislative and municipal authority granted to such a company to erect its poles and suspend its wires in and over the streets of a city will protect it from being treated as a trespasser, and its works from being declared a nuisance, if its works are so constructed as not to obstruct or interfere with the use of the streets by the public or the property owner's right of ingress and egress to and from his abutting property. *Perry v. Railroad Co.*, 55 Ala. 413. If the company, under such circumstances, is not a trespasser in its occupancy of the street, it is competent for the city to exercise whatever legislative authority it may possess in the matter of regulation and control over the streets, in order to render effective the right conferred on the company to plant its poles and suspend its wires in and over the public highway; and it therefore becomes necessary to consider the nature of the property owner's claim to the trees, and the extent of the city's authority in respect thereto, in the exercise of the powers and duties imposed on it to maintain safe and convenient highways throughout the entire width thereof. *City Council v. Wright*, 72 Ala. 411.

Appellees' ownership of the trees, whether the latter were planted by them on the sidewalk, or acquired by

devolution of title to the adjacent property, was and is a qualified and limited ownership, subordinate to the public right to safe and convenient passage, and to the rights, powers and duties of the governing municipal body in the protection, promotion and establishing of every public use in and upon the streets in a city. *Baker v. Town of Normal* 81 Ill. 108. In respect of all such matters, the private right of the owner of the abutting property to maintain the trees must yield to the paramount public right whenever the necessity may arise, although, until such necessity does arise, the owner is clearly entitled to the enjoyment of all the benefits which may result to his property from such trees, and to protection from their destruction or mutilation by others. For instance, if the roots of the trees should cause irregularities or breaks in the pavement upon the sidewalk or street, or if the shade and moisture from the trees should rot or injure a wooden pavement, or if the trees otherwise interfered with vehicles or foot passengers, it would, in our opinion, be clearly within the power and duty of the city to remove such trees, and without liability to the owner. In principle, we can perceive no substantial difference between the exercise of that right by the city in the cases above suggested and where the removal of the trees may become necessary in locating upon a street a public work authorized by law to be placed upon the street, and especially where such public work is employed by the city in so important and vital a matter as the support of wires used by the city in connection with its fire department. The location of telegraph and fire alarm wires and poles upon the streets is, in the nature of the case, necessarily within the sound discretion of the municipal governing body who hold the streets in trust for the use of the public, and who are bound in law to so maintain them as to provide safe and convenient passage to vehicles and pedestrians. It may be said to be matter of common knowledge, as well as the result of experience

in such governing bodies, that the appropriate location for such poles is near and inside the sidewalk curb, where they interfere neither with pedestrians passing along the sidewalk, nor with vehicles traveling along the roadway, and where falling or trailing wires can do the least injury. The city ordinance, therefore, shown by the record, requiring the removal of telegraph and telephone poles from that part of the street used by vehicles, and to be placed on the sidewalk within 6 or 12 inches of the curb, was not an unreasonable or unlawful regulation, but a prudent, if not necessary, requirement for a populous city, and in its enforcement, if it became necessary to trim or remove the trees in front of appellees' property, neither the city, nor appellant acting under authority of and in obedience to the ordinance, can be regarded as trespassers. *Horr & B. Mun. Ord. sec. 229*; *2 Dill. Mun. Cor. sec. 688*; *Bills v. Belknap*, 36 Iowa, 583; *Weller v. McCormick* (N. J. Sup.), 1 Atl. Rep. 516. It is not to be inferred, however, from anything that has been said, that either the city, acting under its police power, or any corporation invested with the right of eminent domain, acting under the city's authority, is absolved from all liability to the owner in such cases; for, if the city or other corporation invested with the right of eminent domain, acting under municipal authority, proceeds to cut or trim trees planted on a sidewalk by the owner of abutting property under lawful authority, when no necessity for such cutting exists, or when the cutting clearly exceeds the necessity, and consequential injury results therefrom to such abutting property, the owner will have his appropriate remedy at law to redress the injury. *Bills v. Belknap, supra*; *City Council v. Townsend*, 84 Ala. 478. But the remedy for such injury, as we have shown, is not in trespass, but for the consequential damages resulting to the adjacent property; and the liability exists by reason of the constitutional provision hereinabove quoted, which invests the owner

not only with the right to damages for property taken, but also where his property is injured or destroyed under such circumstances. The injury to the abutting property of appellees in both cases is shown by the proof not to be the direct and immediate result of the cutting of the trees on the sidewalk, but indirect and consequential, and, furthermore, that appellees, in cutting the trees, were proceeding under lawful authority. If there is any liability, it is in case, and not trespass. Both suits are in trespass, and it results that the City Court erred in its judgment in each case. Both judgments are reversed, and, inasmuch as it appears that neither action can be maintained in the form in which it is brought, judgment for appellant will be here rendered in each case.

It is unnecessary to consider on these appeals the question as to the measure of damages, and we will not anticipate it. Reversed and rendered.

NOTE.—The long concurring opinion of Judge HEAD, in this case, is based upon the supposition that the defendant's servants, while performing the service required of them, went beyond their duty and authority, and wilfully cut the trees beyond any necessity to the proper removal of the wires, doing unnecessary damage to the plaintiff's property, and discusses the question of the defendant's liability for trespass for such cutting. His conclusion is that there is no such liability, unless the servant is a vice-principal; and that the servants in this case were not vice-principals.

For earlier cases and for statutes relating to the cutting of trees by electrical companies, see vol. 5, p. 206, note.

In *Postal Tel. Cable Co. v. Melinda L. Lenoir*, Alabama Supreme Court, July 31, 1895 (18 So. Rep. 266), an action for a statutory penalty for knowingly and wilfully cutting trees on plaintiff's land, held, that the telegraph company, defendant, should be allowed to prove that the trees were on the land of other persons, who had given permission to cut trees on their land wherever necessary for the construction of the telegraph line.

For the following report, copied from the West Chester Republican, August 15 and 16, 1881, the editor is indebted to the courtesy of William W. Cook, Esq., of New York City.

Commonwealth v. John L. Smith, in the Court of Quarter Sessions of the Peace in for the County of Chester and State of Pennsylvania.

CHARGE — MALICIOUS MISCHIEF. Smith is a lineman employed by the Western Union Telegraph Company and was charged by Philip P. Townsend, of this borough, with wilfully mutilating a shade tree in front of his premises. This was one of the three bills, the other two being brought by C. H. Pennypacker, Esq., and Samuel Thompson.

Early in the summer Smith, by direction of Mr. Zeublin, the company's superintendent for this district, trimmed the tops of certain shade trees on Union street so that they should not interfere with or obstruct the telegraph wires. The prosecution claimed: First, that the defendant had no right as the servant of the Western Union Telegraph Company to trim the trees. Second, if he had the right, that the work was recklessly done, that large branches were needlessly lopped off, the trees despoiled both for ornament and shade, and virtually killed.

The jury rendered a verdict for the defendant; the county to pay costs of prosecution. The district-attorney entered a *nolle pros.* on the two other bills. Pierce and Pennypacker, for Commonwealth; T. S. Butler, for defendant.

As the prosecution of the Commonwealth against John L. Smith, a servant of the Western Union Telegraph Company, charged with cutting trees in the public highway, adjoining the premises of Charles H. Pennypacker and others, is of great importance to people who own property along telegraph lines, and as we have heard the charge of the court spoken of as a clear and plain exposition of the law touching the rights of corporations, we publish it in full.

Charge of J. SMITH FUTHEY, P. J.: This case appears to have engendered a good deal of feeling, as appears from its management. You will not regard such feeling, but determine it according to the evidence. The fact that the prosecutor is an individual, and the defendant, or those whose interests he represents, a corporation, must make no difference in your consideration of the case. You will consider the evidence and render such verdict as is warranted thereby.

The Western Union Telegraph Company is the owner of a line which passes along Union street in this borough. This line has been maintained there for a number of years in the manner in which it is now conducted. Trees have been planted along the street, which have grown up, and in their growth appear to have interfered with the proper working of the wires. The company, through its agents, for the purpose of relieving the wires from the interference of the trees, removed the portion of the limbs of the trees which thus interfered, so that the wires might work properly. The defendant, John L. Smith, has been indicted for this act. He was the employe of the company, who, by its direction, thus removed the limbs of the trees which were interfering with the wires. He is indicted under an Act of Assembly, which makes it an offense to wilfully and maliciously mutilate shade trees.

The Act of Assembly provides that "if any person shall wilfully and maliciously injure or destroy any fruit or ornamental tree, shrub, plant or grapevine growing or cultivated in any orchard or road, or upon any

public street or highway in this Commonwealth, he shall be guilty of a misdemeanor."

It is under this Act of Assembly that he is indicted. Now the question which you are trying is, whether the defendant has, within the meaning of this Act of Assembly, wilfully and maliciously injured shade or ornamental trees growing in this town; because, if he has not he cannot be convicted. The question is not merely whether the trees have been injured. That is not enough. The defendant cannot be convicted for simply injuring the trees, because such injury may be done and yet the defendant not be criminally responsible. The question is, whether he wilfully, or maliciously, injured the trees.

Now we say to you, that the telegraph wires being run along that street the company had a right, if in the growth of the trees they interfered with the wires, to trim them so as to relieve their wires; such trimming to be done in a proper manner.

Whether the company should erect higher poles so that the trees underneath them can grow and not interfere with the wires, is not a question here. The court would probably advise the company that it would be a proper thing for it to place higher poles on this street, so that the trees may have their growth and the citizens have the shade, and the company at the same time be accommodated. We probably would advise the company to pursue such a course.

But whether they should do that is not the question here. Whether, instead of trimming these trees, they should have removed the poles and planted higher ones in their place, so that the wires should be higher, is not the question you are trying. We say to you; for the purposes of this case, that the wires being there, and having been there for a number of years, the company had a right to trim the trees in such a manner as to not interfere with the workings of the wires, such trimming to be properly done and so as to do as little injury as possible. Whether higher poles should be erected is a matter which might possibly be investigated in the civil courts. A criminal court is not the place to determine that.

Now in the performance by the defendant of the direction from the company to trim these trees, were the trees wilfully and maliciously injured? You have heard what has been said on this subject in reference to the manner in which the trees were trimmed on behalf of the commonwealth—that the tops and large branches were cut and the trunk of one tree split—and you have heard what has been said on behalf of the defendant by Dr. Wood, the Chief Burgess of the town, by Joseph Worth, who has done a great deal of trimming of trees in West Chester, and by George Achelis, a nurseryman. These witnesses state on behalf of the defendant that no unnecessary trimming was done. One of them said it was not done quite as artistically as it might have been; but inartistic trimming will not make the defendant criminally responsible unless he was acting wilfully or maliciously.

Now you will take the case, gentlemen, and determine what was the character of the act of the defendant. He was forbidden to trim the trees.

If their growth interfered with the working of the wires, and his action was simply intended to relieve the wires, then the fact that he acted after being forbidden so to do by citizens would not make his act criminal. The citizens and the telegraph company have their respective rights. The right of the telegraph company is to so trim the trees as not to interfere with the proper working of their wires. The right of the citizen is that the telegraph company shall not wantonly, wilfully or maliciously commit an injury; the one shall have respect to the rights of the other; that the telegraph company shall trim in such a manner as, while it subserves their purpose, while it frees the wire properly from the interference of the trees, on the other hand does no wanton injury to the trees that have been planted for the comfort of the people.

Now you will determine whether there was anything done by this defendant, other than what was proper to free the wires from the trees. Under the principles which I have laid down to you, you must determine the guilt or innocence of the defendant.

The defendant has asked the court to charge you on certain points.

1. "In order to convict the defendant the commonwealth must prove that the defendant wilfully or maliciously cut the trees."

We have already affirmed this point.

2. "That there is no such evidence, of either wilfulness or malice as would warrant the conviction of the defendant and he must therefore be acquitted."

The question for you is whether under the evidence there was wilful or malicious injury to these trees.

3. "That the Western Union Telegraph Company is now the owner of the telegraph line along the street adjoining the premises of the prosecutor; and has the right to maintain said line by erecting its poles and suspending its wires and to cut and remove all trees interfering with the use of the wires."

We have said to you that the telegraph company has the right to have its line along the street, and in so trimming the trees as to properly guard its line against interference from them, it is without criminal responsibility, unless a wilful or malicious wrong is done.

4. "That the Western Union Telegraph Company is now the owner of the telegraph line along the street adjoining the premises of the prosecutor; and having an apparent right to maintain said line, by erecting its poles and suspending its wires, and to cut and remove all trees interfering with the use of its wires, the actual right to trim the trees cannot be determined in this court; that the act of the defendant is not a crime and he must therefore be acquitted."

This has already been answered in what we have said.

5. "That the defendant being the servant of the Western Union Telegraph Company and authorized by them to trim the trees whose branches were interfering with the use of the wires, he cannot therefore be convicted of the offense for which he is indicted and must be acquitted."

We say to you that being thus authorized to trim trees, he cannot be

convicted on this charge, if he trimmed them for the purpose of relieving the wires from the trees, unless he wilfully or maliciously went beyond what was proper and purposely committed an injury.

6. "That there was no intent on the part of the defendant to wilfully and maliciously cut the trees, he being the servant of the Western Union Telegraph Company, and no other acts of wilfulness being otherwise shown and he should therefore be acquitted."

I have already answered that point in the general charge.

If you convict the defendant, you have nothing to say about the costs. If you acquit him it is your province to dispose of the costs by imposing them either upon the county, prosecutor or defendant, or dividing them between the prosecutor and defendant.

In considering whether the costs should be imposed upon the prosecutor or defendant, you will have reference to the circumstances of the case. Now if the defendant is acquitted, will the circumstances here justify putting the costs upon the prosecutor? He was the owner of a shade tree, which was trimmed, and if he conceived honestly that the company had no right to interfere with it and had injured it, although he failed in the prosecution, should he be mulct in the costs?

And on the other hand, if this defendant is acquitted, are there any circumstances which would warrant placing the costs upon him? If you acquit the defendant, it is because he has not wilfully or maliciously injured the trees, and if his act was proper and done without any malice, without any wilfulness, or intention to do wrong, you will say whether the costs should be put upon him, and the fact that a corporation is at his back makes no difference. Corporations have their rights, just as individuals have their rights, and should not be made to pay costs any more than individuals, unless they are in the wrong.

UNION TRUST COMPANY OF NEW YORK V. ATCHISON,
TOPEKA & SANTA FE RAILROAD COMPANY (POSTAL TELE-
GRAPH CABLE COMPANY, intervener.)

New Mexico Supreme Court, December 20, 1895.

TELEGRAPH LINE ON RAILROAD RIGHT OF WAY.—POST-ROADS ACT.—DIS-
CRIMINATION.

A railroad company cannot by contract discriminate against a telegraph company which has complied with the provisions of the post-roads act of Congress of 1866, so as to prevent the use of its right of way by such telegraph company.

Trust Co. v. Railroad Co.

This statute is not limited in its application to military and post-roads upon the public domain; therefore it applies to and governs a railroad although it passes over and through, in part, private property, obtained by the railroad company by purchase or by condemnation proceedings under the statute.

Cases of this series cited in opinion, appearing in bold faced type: *W. U. Tel. Co. v. Burlington & Southwestern Railroad Co.*, vol. 1. p. 402; *Pensacola Tel. Co. v. W. U. Tel. Co.*, vol. 1, p. 250; *Mercantile Trust Co. v. A. & P. R. Co.*, vol. 5, p. 207.

ACTION to foreclose a mortgage. Appeal by intervenor, from order of First Judicial District Court, sustaining demurrer to intervening petition, filed in behalf of Western Union Telegraph Company.

Statement of facts by **LAUGHLIN, J.**:

This is an action on an intervening petition in the above cause, brought by the Postal Telegraph Cable Company, for an order on the receivers of the Atchison, Topeka & Santa Fe Railroad Company, requiring them to grant to the intervening petitioner leave to construct a line of telegraph poles, wires, etc., over and along the right of way of said railroad company, and to attach the same to the bridges along said right of way, and for aid and assistance in transporting and distributing its men, materials, supplies, etc., along the same, from the southern boundary line of the State of Colorado, through New Mexico, to the city of Albuquerque, and for such other rights, privileges and facilities as may be necessary and convenient in the construction, operation and maintenance of such line of telegraph by the Postal Telegraph Cable Company, and as set out and prayed for in said intervening petition. During January, 1894, the Union Trust Company of the State of New York filed its bill in chancery, in the District Court in and for the county of Santa Fe, against the Atchison, Topeka & Santa Fe Railroad Company (which, for brevity, will hereafter be styled the "Santa Fe Company"), for a foreclosure of a mortgage, and for the appointment of receivers to take into custody all the property belonging

to the Santa Fe Company, and to operate and manage the same *pendente lite*; and on the same date receivers were appointed by the court, and thereupon assumed and took full control of the operation and management of all the property of the Santa Fe Company. On June 11, 1894, the Postal Telegraph Cable Company (which is, for brevity, hereafter styled the "Postal Company"), filed in said District Court an intervening petition in the cause, then pending, of the Union Trust Company against the Santa Fe Company. In the intervening petition, the appellant alleged in substance that it was incorporated under the laws of the State of New York, for the purpose of constructing, operating and maintaining a general system of telegraph lines between each and every post-office, village, town and city in the United States; that it had accepted the condition prescribed by section 5263 of the Revised Statutes of the United States, and had thereby acquired the right to construct, maintain and operate lines of telegraph over the public domain of the United States, and over and along any of the military and post roads of the United States; and that it had obligated itself to transmit all government telegrams at such rates as might be fixed annually by the postmaster-general of the United States, and to transfer its lines to the United States, as provided by law, above cited; that it owns, and has constructed, and now uses and maintains, lines of telegraph in the United States, connecting nearly all the principal cities east of the Rocky Mountains with each other, and has opened and maintains over 3,000 telegraph offices, between all of which offices, when required, it transmits government telegrams at rates annually fixed by the postmaster-general, such rates for the current year being far below the general rate to the public for like services; that it is now engaged in constructing a main or trunk telegraph line from La Junta, in the State of Colorado, via Albuquerque, N. M., over and along the line of the Atchison, Topeka &

Santa Fe Railroad Company, from the northerly line of the territory to a point near Albuquerque, thence along the right of way of the Atlantic & Pacific Railroad in New Mexico and Arizona, and into the State of California, to Mojave, where it is to connect with the Pacific Postal Telegraph Company's lines; that the Santa Fe Company's system in New Mexico was constructed by the New Mexico & Southern Pacific Railroad Company, the Rio Grande, Mexican & Pacific Railroad Company, and the Silver City, Deming & Pacific Railroad Company, all chartered under the laws of this territory, which were after construction, leased and operated by the said Santa Fe Company, and that all of said railroad companies are land grant railroads, and have accepted and complied with the terms and provisions of the Act of Congress approved March 3, 1875, and, as such, are entitled to a right of way, over and through the public domain, of 100 feet on each side from the center of the track, and that all of said right of way has been occupied and used by each, for railroad and station purposes, and was taken substantially from the public lands of the United States; and that said Postal Company proposes to construct its line of telegraph upon and along the right of way in New Mexico, of all three of said railroads; that the said Santa Fe Company and the other railroads named are, by virtue of the laws of the United States, military and post roads, and that it, the Postal Company, is, by virtue of the laws of the United States, entitled to, and has the right to, construct its telegraph line over and along all military and post roads of the United States; that it applied to the receivers of the Santa Fe Company for the right to so construct, maintain and operate its main and branch lines of telegraph, upon the right of way of the Santa Fe Company's system, and for the usual aid in distributing its poles, materials, supplies, and water for its men, while so constructing its lines, and offered to pay the usual and customary prices to said

receivers for the transportation of the same, and to pay to said receivers a just compensation for any damages or injuries sustained for its use and occupation of the right of way, but that said receivers declined and refused to allow it to construct its telegraph line upon the right of way, and refused and declined to furnish the necessary aid and facilities for the same, alleging as a reason that a contract had previously been entered into between the Santa Fe Company and the Western Union Telegraph Company (which is hereafter called the "Western Union Company"), one clause of which they consider conflicted with the request of the Postal Company, and which the receivers felt bound to respect, until the court should hold to the contrary; otherwise the receivers would be willing to grant the request of the Postal Company, on the payment of a proper compensation; that facilities are granted by the Santa Fe Company to the Western Union Company which are denied to the Postal Company, and that such denial by said receivers is grounded on the clause in said contract now existing between said Santa Fe Company and said Western Union Company, and that said clause in said contract is contrary to law and public policy, and therefore void; with a prayer for the relief sought. The receivers answered, and among other things show that they declined and refused to comply with the request of the Postal Company on the ground that the Western Union Company insists on the validity and binding force of clause 12 in the contract between the Santa Fe Company and the Western Union Company, but, were it not for that clause, the receivers would grant the request of the Postal Company; that the construction of the main and branch lines of telegraph, by the Postal Company proposed, would increase the revenues, and add to the conveniences and facilities, of the property of the Santa Fe Company, in their hands as such receivers; that the receivers are advised and believe that the said twelfth clause in said

contract, in so far as it relates to the right of way of the Santa Fe Company, and granting the same to the Postal Company, is void and of no binding force, but, owing to the demand made on them by the Western Union Company, they feel bound to respect it until the court shall have held it void, and submit to the court the question as to the validity of the said twelfth clause, and as to whether or not the Western Union Company was a necessary party to this proceeding. The contract referred to was entered into between the Santa Fe Company and the Western Union Company on the 21st day of November, 1888, and the twelfth clause referred to in that contract reads as follows, to wit: "Twelfth. The railroad company, so far as it legally may, hereby grants and agrees to assure to the Western Union Telegraph Company the exclusive right of way on, along and under the line, lands and bridges of the railroad company, and all extensions and branches thereof, and of railroads owned, leased, operated or controlled by it, or by corporations owned, leased, operated or controlled by it, for the construction, maintenance, operation and use of lines and poles and wires, and underground or other lines, for commercial or public uses or business, with the right to put up or construct, or cause to be put up or constructed, from time to time, in accordance with the provisions of this agreement, such additional wires and such additional lines of poles and wires, and underground or other lines, as the telegraph company may deem expedient, and the railroad company will not, except as legally required, transport men or materials for the construction, maintenance or operation of a line of poles and wire or wires, underground or otherwise, in competition with the lines of the telegraph company, party hereto, except at and for the railroad company's regular local rates, nor will it furnish, except as legally required, for any competing line, any facilities or assistance that it may lawfully withhold, nor, except as legally required, stop its

trains, nor distribute material therefor, at other than regular stations, providing, always, that, in protecting and defending the exclusive grants conveyed by this contract, the telegraph company may use and proceed in the name of the railroad company, or of any other company owned, leased, operated, or controlled by it, but shall indemnify and save harmless the railroad company and its subordinate companies from any and all damages, costs, charges, and legal expenses incurred therein or thereby." The Western Union Company appeared, and filed a demurrer to the intervening petition of the Postal Company, upon seven special grounds, and, after the hearing on the same, the court sustained the demurrer, and dismissed the intervening petition, from which decision the cause is here on appeal.

J. E. Lousch and Childers & Dobson, for appellant, Postal Telegraph Cable Co.

H. L. Waldo, for the receivers.

Catron & Spiess and H. D. Estabrook, for appellee, Western Union Tel. Co.

LAUGHLIN, J. (after stating the facts):

The remaining point for consideration is as to the validity and legal force of the covenants in the twelfth clause in the contract entered into between the Santa Fe Company and the Western Union Company, on the 21st day of November, 1888; and it is to continue in force for 25 years from that time. This superseded a similar contract entered into between the same corporations in January, 1872, and, stripped of its legal verbiage, it means that the Santa Fe Company has conveyed to the Western Union Company an exclusive grant and franchise, over, along and through its

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right of way, for telegraphic purposes, and agrees not to aid, or assist any other person, company or corporation in the construction, operation and maintenance of any other telegraphic line along, over or through its right of way, in so far as it may legally decline to do, and is an effort on the part of these corporations to create and maintain a monopoly of transcontinental telegraphic business in the Western Union Company, and, in so far as this clause has this effect, it is contrary to public policy, and an attempt to cripple trade, in restraint of commerce, and is void. The Postal Company proposes to construct its line over the right of way of the New Mexico & Southern Pacific Railroad, from the north boundary line of New Mexico, at or near Raton, to the city of Albuquerque, which is a part of the Santa Fe Company's system; and it is shown in the answer of the receivers that this right of way was secured over the public domain, in large part, under and by virtue of the act of Congress, approved March 3, 1875, granting a right of way to railroad companies over the public domain, of the width of 100 feet on each side from the center of the track. This line of road is a military and post-road, having complied with all the requirements of law to make it such, and, by virtue of the laws of the United States, the Postal Company has the right and the authority to construct its line, poles, wires, etc., over, along and upon the right of way, as proposed by it, so long as it in no way hinders or interferes with the necessary and proper management and operation of the railroad, and pays the railroad company a proper and customary compensation for any and all services performed by it, and pays to it due and proper compensation for any damages it may sustain by reason of the construction and maintenance of the telegraph line by the Postal Company.

Any telegraph company now organized, or which may hereafter be organized, under the laws of any State, shall have the right to construct, maintain and operate lines of telegraph through and over any portion of

the public domain of the United States, over and along any of the military or post-roads of the United States which have been or may hereafter be declared such by law, and over, under and across the navigable streams or water of the United States; but such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and water, or interfere with the ordinary travel on such military or post-roads.

Rev. 'St. U. S. sec. 5263. This section has been the source of much discussion by many of the courts of the country, and in each case it has been held that the section quoted is in its nature prohibitive, as to the force and effect of any contract entered into by a railroad company, granting an exclusive privilege and franchise over and along its right of way over and through the public domain to any single telegraph company, where such railroad has acquired its right of way under and by virtue of an act of Congress, or which are or may be declared military or post roads by act of Congress. In *W. U. Tel. Co. v. Burlington & S. W. Ry. Co.*, 11 Fed. Rep. 1, in passing on a clause in a contract entered into between the railroad company and the telegraph company, which is similar in its nature and effect to the clause in the contract under consideration, Judge McCrARY said: "In our opinion, it is not competent for a railroad company to grant to a single telegraph company the exclusive right of establishing lines of telegraphic communication along its right of way. The purpose of such contracts is very plainly to cripple and prevent competition, and they are therefore void, as being in restraint of trade, and contrary to public policy. They are also in contravention of the act of Congress of July 24, 1866, which authorizes telegraph companies to maintain and operate lines of telegraph over and along any of the military and post-roads of the United States which have been or may hereafter be declared such by act of Congress. We, therefore, must hold the second subdivision of the contract void." In the case of *Pensacola Tel. Co. v. W. U. Tel. Co.*, 96 U. S. 1, wherein the State Legislature of

Florida granted to the Pensacola Telegraph Company an exclusive franchise and privilege, for telegraphic purposes, over a certain portion of the territory of that State, in passing upon the injunction asked to restrain the Western Union from constructing its lines over that territory, Chief Justice WAITE, speaking for the court, said: "The State of Florida has attempted to confer upon a single corporation the exclusive right of transmitting intelligence by telegraph over a certain portion of its territory. . . . The State, therefore, clearly has attempted to regulate commercial intercourse between its citizens and those of other States, and to control the transmission of all telegraphic correspondence within its own jurisdiction. The statute of July 24, 1866 (14 Stat. 221), in effect, amounts to a prohibition of all State monopolies in this particular. It substantially declares, in the interest of commerce, and the convenient transmission of intelligence from place to place by the government of the United States and its citizens, that the erection of telegraph lines shall, so far as State interference is concerned, be free to all who will submit to the conditions imposed by Congress, and that corporations organized under the laws of one State for constructing and operating telegraph lines shall not be excluded by another from prosecuting their business within its jurisdiction, if they accept the terms proposed by the national government of this national privilege." This is just what the Western Union Company is now attempting to do. Its aim and effort is to monopolize all the transcontinental telegraphic business through New Mexico, Arizona and Southern California by prohibiting the Postal Company from constructing a competing line for the transmission of telegraphic correspondence across this part of the continent. If a sovereign State, through its chosen representatives, has not the power to grant special privileges of this kind, then a corporation certainly cannot. The general government has power to regulate over every foot of its territory. It

is not limited by State lines, and knows no boundaries, except national. The electric telegraph line is, at this day and time, as much a common carrier and national highway, in the transmission of telegraphic business and intelligence, as the railroads and steam vessels; and the United States government will not permit its citizens to be compelled to do business with any one single individual or corporation, when other individuals and corporations offer to invest capital and engage as competitor for a share of the public and private business. The government has reserved to itself and its citizens the right and privilege to share in the convenience and advantages produced by competitors for their patronage and support. In *Mercantile Trust Co. v. Atlantic & P. R. Co.*, 63 Fed. Rep. 513, a case exactly similar to the case at bar, United States District Judge Ross, in passing upon the same clause, in the same contract entered into between the Atlantic & Pacific Railroad Company, in a very lucid opinion reviewed the several Congressional acts and decisions of the courts on that subject, and held the clause here in question contrary to public policy, in restraint of trade and commerce, and void.

But, it is insisted by appellee the Western Union Company that the act of Congress in question does not apply because it is shown by the record that a portion of the right of way of the New Mexico & Southern Pacific Railroad is over and through, in part, private property, obtained by the railroad company by purchase, or by condemnation proceedings under the statute. In passing on this point, raised in the case of *Pensacola Tel. Co. v. W. U. Tel. Co.* *supra*, the Supreme Court of the United States say: "It is insisted, however, that the statute extends only to said military and post-roads as are upon the public domain; but this, we think, is not so. The language is, 'through and over any portion of the public domain of the United States, over and along any of the military or post-

roads of the United States which have been or may be declared such by act of Congress, and over or across the navigable streams or waters of the United States.' There is nothing to indicate an intention of limiting the effect of the words employed, and they were, therefore, to be given their natural and ordinary significance." The Santa Fe Company never obligated itself to do more than it has done. It simply sold and conveyed to the Western Union Company a one-half interest in its telegraph lines and telegraph business, for the consideration therein stated, and obligated itself to protect the Western Union Company in its exclusive privileges only in so far as it might legally do, and it has fulfilled its covenants by carrying them out on its part, and submitting the question as to the legality and binding force of these covenants to the courts for their interpretation and construction. Entertaining these views, the court below erred in sustaining the demurrer interposed by the appellee in behalf of the Western Union Telegraph Company. The decision of the court below is therefore reversed, and the cause remanded, with directions to the District Court to overrule the demurrer, and proceed in accordance with this opinion.

SMITH, C. J., and HAMILTON, BANTZ and COLLIER, J.J., concur.

NOTE.—See note to next case.

POSTAL TELEGRAPH CABLE COMPANY OF LOUISIANA V.
MORGAN'S LOUISIANA & TEXAS RAILROAD & STEAMSHIP
COMPANY.

Louisiana Supreme Court, Jan. 4, 1897.

TELEGRAPH LINE ON RAILROAD RIGHT OF WAY.—POST-ROADS ACT.—
CONDEMNATION.

(Head-note by the court):

Act No. 124, of 1880, gives the right to construct a telegraph line over a railroad's right of way.

The acts of Congress of 1866 and 1872 are on the same subject, and give the right to construct a line of telegraph, under certain conditions, along and over the right of way of railroads. The State law is subordinate to these acts, but may be resorted to for condemnation and compensation.

Doctrine as to damages awarded by the jury in condemnation cases, in case of *Telegraphic Cable Co. v. Railway Co.*, 43 La. Ann. 523, affirmed. Case of this series cited in opinion, appearing in bold faced type: *Pensacola Tel. Co. v. W. U. Tel. Co.*, vol. 1, p. 250.

APPEAL by defendant from judgment of Civil District Court, Parish of Orleans.

Denegre, Blair & Denegre, for appellant.

Farrar, Jonas & Kruttschnitt and *J. H. McLeary*, for appellee.

McENERY, J.: The plaintiff corporation, organized under the laws of Louisiana, instituted this suit to obtain the condemnation of the property of the defendant corporation necessary for the operation of its line of telegraph over the right of way of the defendant corporation. There was an exception of no cause of action filed. The ground of the exception is that Act No. 124 of

1880 does not authorize the construction of a telegraph line over the right of way of the defendant corporation; that said act only authorizes the construction parallel to and beyond the right of way, as the right of way is essential to the proper and successful operation of the railroad, and that the construction of telegraph lines would, by multiplication of wires, interfere with the running of trains, and the possible falling of poles would endanger the safety of trains. The act authorizes the construction of telegraph lines along and parallel to any of the railroads in this State. It does not state how far they shall be from the railroad, but there is a proviso that there shall be, by the construction of the lines of telegraph, no obstruction in the way of the operation of the railroad. If the location of the line is too near the road, the pleadings in this case do not warrant us in passing upon this fact. The question presented is, first, is there authority in said act for the use of a part of the right of way to construct said plaintiff's line? and, second, the amount of compensation to be awarded the defendant.

So far as the location of the telegraph line over defendant's right of way is at issue, the act of Congress of July 24, 1866, provides "that any telegraph company now organized, or which may hereafter be organized under the laws of any State of the Union, shall have the right to construct, maintain, and operate lines of telegraph . . . over and along any of the military or post-roads of the United States, which have been or may hereafter be declared such by act of Congress, . . . provided said lines shall not be so constructed as to interfere with travel" on such roads; and provided, also, "that, before any telegraph company shall exercise any of the powers or privileges conferred by this act, such company shall file its written appearance with the postmaster-general of the restrictions and obligations required by this act." Congress, in 1872, declared all the railroads in the

country, which are now or may hereafter be in operation, post-roads. The plaintiff corporation has filed its appearance and acceptance of the provisions of the act of 1866. The defendant contends that, as the plaintiff is proceeding under the act of 1880, he must be confined to its provisions.

But the act of Congress is paramount, so far as location or the right of way is concerned, and the act of 1880 is auxiliary to it, and provides for the method of condemnation and compensation. The act of Congress of 1866 authorizes no compulsory process. *Pensacola Tel. Co. v. W. U. Tel. Co.*, 96 U. S. 1. Hence the necessity of resorting to State process for condemnation and compensation.

On the merits we find some difficulty in arriving at a satisfactory conclusion as to the amount which should be awarded the defendant for the use of the right of way. The inconvenience which the defendant may experience is controverted. It is asserted by plaintiff's witnesses that the establishment of the telegraph line will cause no inconvenience to defendant, but, on the contrary, will be an advantage. This defendant's witnesses deny, and we believe with them that inconveniences may occur and additional burdens may be imposed upon defendant. But we have no means of ascertaining the amount of damage in money that would be inflicted upon defendant. This inconvenience is an element, however, to go into the general estimate. The lands may, along defendant's right of way, be of peculiar or particular value for specific purposes, but we do not understand that they are now devoted to these purposes. The plaintiff must, however, make compensation proportionately for the cost and expense of defendant in putting in condition the right of way. It cannot avail itself of improved conditions without compensation. The construction of plaintiff's line will occupy a right of way of defendant of some ten feet, with its cross pieces on poles.

We do not care to disturb the verdict of juries in cases like the instant one without manifest injustice is done in either underestimating or the giving of excessive awards. *Telegraph Cable Co. v. Railway Co.*, 43 La. Ann. 522. We are of the opinion that the jury returned a verdict substantially correct. Judgment affirmed.

NOTE.—The following is Act No. 124, of 1880, referred to in the above opinion:

“Corporations chartered or formed under the laws of this or any other State, or under the laws of the United States, for the purpose of transmitting intelligence by magnetic telegraph or telephone, or other system of transmitting intelligence, the equivalent thereof, which may be hereafter invented or discovered, may construct and maintain such telegraph, telephone or other lines necessary to transmit intelligence along all state, parish or public roads or public works, and along and parallel to any of the railroads in the State, and along and over the waters of this State; *provided*, that the ordinary use of such roads, works, railroads and waters be not thereby obstructed, and along the streets of any city, with the consent of the council or trustees thereof, and such companies shall be entitled to the right of way over all lands belonging to the State and over the lands, privileges and servitudes of other persons and corporations, and the right to erect poles, piers, abutments and other works necessary for constructing, working, operating and maintaining their lines and works, upon making just compensation therefor. That in the event such company shall fail, on application therefor, to secure such right, by consent, contract or agreement, upon just and reasonable terms, then such companies or corporations shall have the right to proceed to expropriate the same, as provided in and by the laws of the State relative to expropriation of lands for railroads and other works of public utility, and shall so construct their works as not to impede or obstruct the full use of the highways, navigable waters or the drainage or natural servitudes of the land over which the right of way may be exercised. But no company operating under the provisions of this act shall have the power to contract with the owners of land or with any other corporation for the right to erect and maintain any telephone, telegraph or other line for the speedy transmission of intelligence over his or its lands, privileges or servitudes, to the exclusion of the lines of other companies operating under the provisions of this act.”

For cases other than the two preceding upon the right of telegraph companies to maintain their lines on railroad rights of way, see vol. 5, p. 233, note.

**NORTHERN CENTRAL RAILWAY COMPANY V. HARRISBURG &
MECHANICSBURG RAILWAY COMPANY ET AL.***Pennsylvania Supreme Court, Oct. 5, 1896.***ELECTRIC CROSSING STEAM RAILWAY.**

A street railway company, limited by statute to operating in established streets and highways, cannot, under a statute permitting it to cross steam railways at grade, make such crossing, without the consent of the steam railway company, at any place other than an established street or highway; neither can it make an overhead crossing by viaduct, except subject to the same limitations.

The maintenance of a viaduct over a steam railway, and the operation of electric street cars over the same, must cause an appreciable increase of danger to the steam railway company, its patrons and employees; and injunction is proper to prevent the unauthorized construction of such viaduct.

APPEAL by the complainant from decree dismissing bill to restrain construction of viaduct.

Edw. B. Watts, W. F. Sadler and John Hays, for appellant.

A. G. Miller and J. W. Wetzel, for appellees.

STERRETT, C. J.: It is unnecessary to consider all the questions presented by this record. Such of them as are worthy of notice have been referred to, at least briefly, by the learned president of the common pleas in his opinion, findings of fact, and conclusions of law sent up with the record. The general and controlling question, however, is whether a company chartered under the street railway act of May 14, 1889 (P. L. 211), has the right to construct, maintain and operate its road across the lines of a steam railroad company, without the consent and against the protest of the latter, at a point where its roadway is not

crossed by a public highway. The answer to this question must, of course, be sought for in the expressly granted or necessarily implied powers and authority with which the street railway company has been invested by the law under which it was created, and subject to which it continues to exist. If the right referred to cannot be found therein, it necessarily follows that the question must be answered in the negative. Section 1 of the act of 1889 provides "that any number of persons, not less than five, may form a company for the purpose of constructing, maintaining and operating a street railway on any street or highway upon which no track is laid, or authorized to be laid, or to be extended under any existing charter, with the privilege of so much of any street, used or authorized to be used under any existing charter, as is hereinafter provided, for public use in the conveyance of passengers, by any power other than by locomotive; and for that purpose may make and sign articles of association, in which shall be stated . . . the streets and highways upon which the said railway is to be laid and constructed," etc. Section 4, authorizing extensions and branches, declares that "the act of the company authorizing any extension or branch shall distinctly name the street and highways on which said extension or branch is to be laid or constructed." It also provides that "no extension or branch shall be constructed on any street or highway upon which a track is laid or authorized under any existing charter, except as hereinafter provided." Section 14 authorizes the use of "such portion of the track of any other company, already laid down, as may be necessary to construct a circuit upon its own road at the end thereof." The length of track to be thus used "only with the consent of the local authorities of the city, borough or township, in no event shall exceed five hundred feet of single track." It also prescribes the mode in which compensation for such use shall be made, etc. The next section declares: "No street passenger

railway shall be constructed by any company incorporated under this act within the limits of any city, borough or township without the consent of the local authorities thereof, nor shall any street railway be incorporated hereunder which shall not have a continuous route from the beginning to the end, forming a complete circuit with its own track, excepting the five hundred feet to be used under section fourteen." Section 17 authorizes the occupation and use of turnpikes, not exceeding sufficient width for two tracks, and requires that compensation for such use shall be first made to the owner or owners of such turnpike or turnpikes, in the mode prescribed in section 14, aforesaid. With the exception of above-mentioned restricted and qualified rights to use a small section of another company's track in forming a circuit, and to occupy and use longitudinal strips of turnpikes, etc., street railway companies chartered under said act are certainly not, in express terms, invested with any other power or authority in the nature of eminent domain. Indeed, the specific grant of these qualified rights is strongly indicative of legislative intention to withhold from such companies every other power of eminent domain. This conclusion is further fortified by the provisions intended to restrict them to established streets and highways as the location of their main lines, extensions, and branches. As we have seen, their right to construct, maintain and operate street railways is specifically limited to existing streets and highways. The names of the streets and highways selected by them must be stated in each company's articles of association. In the recorded action of the company exercising the branching power, etc., authorized by the act, it must also "distinctly name the streets and highways on which said extension or branch is to be laid or constructed." In brief, in the selection or adoption of the route, either of their main line or of any extension or branch thereof, they are expressly confined to established streets or other

avenues in cities and boroughs, and to public highways in townships, subject to such further restrictions, even as to them, as are specified in the act. Outside of and beyond the restricted power and authority as to selection and adoption of a route, etc., thus granted, they are not invested with any other authority in that regard except such as may be necessarily implied. Without ignoring the well settled rules applicable to the construction of charters, it is impossible to reach any other conclusion than that the Legislature, in this carefully drawn and well guarded act, intended to withhold from companies chartered thereunder everything in the nature of a roving commission under which they might assert the right to locate, construct, and operate street railroads wherever they pleased. It was successfully contended in the court below that the authority given in section 18 of the act "to cross at grade, diagonally or transversely, any railroad operated by steam or otherwise," is general in its application, and confers an unqualified right to cross a steam railroad anywhere, without regard to whether there is an established street or highway crossing at the same point or not. This is a grave mistake. As we have seen, location, construction and operation of street railways are authorized only on established streets and highways. Section 18 is evidently predicated of that fact, and hence the authority therein granted is necessarily applicable only to crossings at points where the railroad is crossed by a street or highway. In other words, it refers only to crossing at a point where the street or highway on which the street railway is located crosses the steam railroad. To hold otherwise would not only be contrary to the manifest intention of the Legislature, but it would involve the constitutionality of the eighteenth section.

As to the property on which the alleged trespass was threatened, the learned trial judge found that "at the place of crossing plaintiff has a right of way sixty feet in

width, and an adjoining strip of land twenty feet wide, which was acquired by deed;" and in sustaining plaintiff's eighteenth and nineteenth exceptions to his previous rulings, he further found that said 20 feet wide strip of land is owned by it in fee; that prior to filing the bill defendant company attempted to cross plaintiff's land and right of way at the point in question, and that plaintiff had reason to apprehend that such attempt was imminent, etc.; but in view of the facts, as he found them, he held as matter of law that plaintiff's right of way and ownership in fee of said strip of land were immaterial; that the right to cross plaintiff's railroad, etc., at an elevation of about 22 feet above the surface of its tracks was conferred upon the Harrisburg & Mechanicsburg Electric Railway Company by section 18 of the act, and then said: "The long, narrow piece of land referred to, which is held in fee, is essentially part and parcel of the railroad, just as much so as the easement which it adjoins, and the right to cross it is as clearly given as is the right to cross the easement." For reasons already suggested, we think he was clearly wrong in this. Aside from the ownership in fee of the 20 feet wide strip, the plaintiff has a substantial property interest in its right of way which the defendant is bound to respect. While that interest cannot be called a fee, it is a species of title that has some of the incidents of an estate in land. As was well said by our Brother MITCHELL in *Railroad Co. v. Reading Paper Mills*, 149 Pa. St. 18: "Such title is sometimes called an 'easement,' but it is a right to exclusive possession; to fence in, to build over, the whole surface; to raise and maintain any appropriate superstructure, including necessary foundations; and to deal with it, within the limits of railroad uses, as absolutely and as unconditionally as an owner in fee. There was no such easement at common law. . . . It would seem to be rather a fee in the surface, and so much beneath as may be necessary for support, though a base or conditional

fee, terminable on the cesser of the use for railroad purposes. But, whatever it may be called, it is, in substance, an interest in the land special and exclusive in its nature, and which may be the subject of special injury, . . . and, therefore, within the rule which governs the application of equitable relief."

There is also manifest error in the tenth finding of fact, viz.: "So far as the evidence has disclosed, the building of defendant's railway and the running of cars thereon will not injure or affect the operation of plaintiff's railroad, or inflict upon plaintiff any actual damage. There will be no increase of danger from accident or other cause." Aside from the unauthorized occupation of plaintiff's property by spanning the same with an overhead bridge or viaduct, 100 feet or more in length and about 22 feet above its tracks, at a point where there has never been an overhead or grade crossing of any kind, it is impossible to reach the conclusion that such a superstructure, with electric cars running thereon at frequent intervals, will not result in a greater or less increase of danger to plaintiff company, its patrons and employes. To what extent the danger from accident or other cause would be increased would, of course, depend very largely on the degree of care and skill exercised in the construction and maintenance of the bridge and in the operation of the street railway thereon; but that, under the most favorable circumstances, there would be an appreciable increase of danger, no one can doubt.

It follows from what has been said that plaintiff had standing to resist the threatening invasion of its rights by the Harrisburg & Mechanicsburg Electric Railway Company, one of the defendants, and, upon the facts shown by the pleadings and proofs, it was entitled to the relief prayed for. The decree dismissing the bill is accordingly reversed, and the perpetual injunction specially prayed for is now granted against the Harrisburg & Mechanicsburg

Railway Company, with costs to be paid by said company; and as to the other defendant the bill is dismissed.

NOTE.—See note. vol. 5, p. 261.

TERRE HAUTE ELECTRIC LIGHT & POWER COMPANY v.
CITIZENS' ELECTRIC LIGHT & POWER COMPANY.

Superior Court, Vigo County, Indiana, Feb. 12, 1895.

ELECTRIC LIGHT COMPANIES.—INTERFERENCE.

As between two electric companies, each having permission to use the streets, and each furnishing commercial and domestic lights to citizens, but one only having also a contract with the city to light its streets and public places, the latter, though later in occupation of the streets, has the paramount right, and when the poles and electrical appliances of the two companies interfere, the company doing only private lighting must yield.

Questions of weight of evidence, estoppel and *res judicata* considered, and motion for temporary injunction denied.

S. C. Davis and Faris & Hamill, for plaintiffs.

McNutt & McNutt and Lamb & Beasley, for defendants.

Opinion by DAVID W. HENRY, J.: In this proceeding plaintiff asks this court to exercise in its favor the extraordinary power of injunction, an equitable right exercised by courts only in cases in which there is no adequate remedy in law.

As a basis of its claim plaintiff alleges that it has heretofore been engaged in furnishing electric lights to the city of Terre Haute under an ordinance and contract with said city to light its streets, alleys and public places. The complaint also alleges that the plaintiff has heretofore

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been, and is engaged in furnishing electric light—commercial and domestic, to the citizens of said city.

The complaint further discloses the fact that the plaintiff's contract to furnish the public lights expired on the 31st day of January, 1895, but it expects to continue in the business of furnishing commercial and domestic lights to the citizens of said city on and after the said date.

Plaintiff also alleges that in pursuance of its contract with the city it erected poles, wires and other appliances in the streets and alleys of said city, and that the defendant Citizens' Electric Light & Power Co. has been and is engaged in erecting poles, wires and other appliances on the streets and alleys in such a manner as to interfere with the plaintiff in its rights aforesaid, to its irreparable damage, and upon this application properly verified, this court granted a temporary restraining order on the 21st day of January last, and fixed a time for defendant to appear and answer.

Defendant accordingly answered in substance:

1. That it has a contract with the city of Terre Haute to light the streets, alleys and public places thereof for a period of five years, commencing on the 1st day of February, 1895, in which contract it is required to furnish lights substantially at the same places at which plaintiff has heretofore been furnishing lights to said city.

2. Also, that in pursuance of said contract, to enable it to get ready to begin lighting the city by the first day of February, it expended large sums of money in the erection of poles, wires, electrical appliances and a power plant; that prior to bringing this suit it had erected about 2,000 poles, dug holes for more than that number and strung thirty-five miles of wire; that plaintiff had full knowledge of all steps that were being taken and took no steps to prevent the same from being done. In substance, stood by while these great expenses were being incurred, and by

reason of plaintiff's seeming acquiescence, it is thereby estopped from enjoining defendant in the further progress of the work.

3. Also that the matters involved in this cause were substantially presented and determined in an issue in the Vigo Circuit Court, wherein this defendant was the plaintiff and this plaintiff was the defendant, cause No. 17,723, thereby alleging that the matters here in controversy are *res adjudicata*.

4. And a denial as to said interference.

The pleadings are lengthy and the evidence voluminous, and without going into detail I shall endeavor to determine this controversy as briefly as I can. In doing so it is necessary to take into consideration what rights belong entirely to the city, as well as what the courts have jurisdiction of in this kind of a case, and also the question of what has been heretofore adjudicated.

It is the law that the council of the city of Terre Haute has the exclusive power over its streets and alleys. Also that the council has the power to make the contracts which are alleged to have been made, both with plaintiff and defendant, for public lighting. The paramount feature, as it occurs to the court, if not the controlling element in the law of this case, is whether or not the right of the city to light its streets and alleys is not superior to the rights to furnish commercial and domestic lights to the citizens of the city.

I think the law is clear that no discrimination can be made as between persons and corporations who desire to furnish commercial and domestic lights only, and that the law is equally clear that it is the province of the city, and not the courts, to regulate these matters by a general ordinance in which it may require them to go under ground, if necessary, and may decline the use of the streets for such purposes altogether.

It is not a duty enjoined by law upon the common

council to grant to any person or corporation the right to furnish commercial and domestic lights, nor is the council in any manner interested in the question of profit or loss on behalf of persons thus engaged, and the only concern that the council has in these matters is that it shall not grant a monopoly or exclusive right to any person or corporation, but the law enjoins upon it a duty, in case it grants such rights, that there shall be no discriminations made as between persons securing such rights.

The question that arises in the mind of the court is whether or not, in the exercise of the right to light the streets of the city, a duty which is in the nature of a police power is not superior to the privileges granted to parties who merely furnish commercial and domestic lights.

In other words, whether or not the common council can contract for public lights, with a view of securing them at the cheapest possible price, and in doing so, grant the right of way necessary to the construction of such lights over the cheapest possible route, which should not be interfered with pending such contract.

I find, as a matter of fact, that the plaintiff did have the contract, alleged in its complaint, to light the streets of said city until and including the 31st day of January, 1895. And I also find that the defendant has a like contract to furnish the said city lights from and after the 1st day of February, 1895.

Plaintiff claims that defendant is trespassing upon their right of way. Could or did the city give plaintiff a right of way?

The city can confer no greater right than it has. It has only an easement in the lands occupied by streets and alleys for the purpose of thoroughfare. It could grant no more than it had. Consequently when the common council gave plaintiff a franchise it was given a license for the purpose of lighting the streets and also for commercial and domestic lighting. On and after February 1st plaintiff

iff's license for the purpose of using the streets and alleys to light said city was at an end.

Defendant having a contract to light the city on and after said day, as we have heretofore stated, commenced. Defendant's license or right was as great as that of plaintiff, and having to do public lighting, and the public contract with plaintiff having expired, *defendant would then have the paramount license*, and when the poles and electrical appliances came in contact with those of plaintiff in the discharge of defendant's contractual duties plaintiff would simply have to yield to the paramount license.

Again, defendant company, in order to light the streets, must place the lamp poles where lights are required under the contract, and having the right to set its poles at the most convenient point for lighting the streets, would have the right, by the most convenient, direct, cheapest and practical route, to bring its wires to the point where the street is to be lighted. Having that right, defendant would have the right to place its poles and string its wires wherever these convenient places were, properly observing the ordinances of said city governing the setting of poles and the stringing of wires, rights of the public and abutting property owners. It should also observe the rights of plaintiff company to continue their plant as a commercial plant.

As to the question of requiring defendant to condemn, which plaintiff claims, before acquiring a right of way over, by or through plaintiff, it is the opinion of this court that under the act of 1883 cities have the right to do their own lighting without such condemnation, so long as they do not leave the streets and alleys. If they have the right to do their own lighting without such condemnation, then it follows, in the judgment of this court, that they have the right to delegate that power to a contracting party.

Defendants in this case, therefore, have the same right without condemnation that the city would have. No man

would have to condemn his own farm in order to run a railroad or telegraph line through it.

It must be understood that a party that goes into competition and bids for public lighting and secures the same by making the lowest bid, as they are generally secured in this way, must have the undisputed right to use the streets and alleys to set poles and string its wires thereon, in order to carry out said contract. This is one of the elements of the bid, otherwise the party that had the former contract would hold on forever and the public would be helpless and without the power to displace them and secure a lower bidder.

It is claimed that the effect of a 5,000 volt circuit coming in contact with a 2,500 volt circuit would effect the weaker in such a manner as to burn out the dynamos and lamps in the instruments on the weaker circuit. That is substantially the evidence of experts Brooks, Vanslyke, Waggoner, Clisdell, Hilton, Ellis and others.

On the contrary, it is claimed by an equal number of the defendant's witnesses, among whom are Stahley, Warren, Tucker, Niles, Pierce and others, that if the electrical circuit of both companies be properly constructed and maintained, and the wires of the two systems come in actual metallic contact, there would be no interference with either circuit and no injury or damage to the appliances of either, notwithstanding one is of the voltage of 2,500 and the other 5,000. And defendant shows that even if one of the defendant's wires should break, the current upon said wires would immediately cease and would not be re-established.

The affidavits of defendant show a great many of them are men of national reputation. Applying the rule that we must apply in deciding a question, it is plain as to what the court would have to conclude upon this question.

The evidence introduced by plaintiff, supported by a number of affidavits, is, that there would be interference

to plaintiff's wires by the sagging and swaying of the wires of defendant, and that the sag on these wires would be about eighteen inches, more or less, according to the construction and temperature.

On the contrary, affidavits of defendant made by equally as reputable witnesses, and more in number, show that the sagging would not be more than eight or ten inches under like circumstances, and the swaying would be much less than the sagging, and in connection with this it is shown by as many as eight witnesses, who have made an examination of defendant's line, that the wires would be from five to ten feet higher than plaintiff's wires, which is not denied, except in two or three locations, which, if true, as sworn to by plaintiff's witnesses, then there would be no interference to plaintiff's wires.

Plaintiff claims that the poles coming in contact with defendant's wires would cause "grounds," which contact would cause dynamos to flash and danger to the trimmer, and should a second "ground" be made, put out the lights and thus destroy the efficiency of the light and service of the plaintiff company.

But defendant also denies that there will be any such places when the line is completed and ready for operation. They also deny that if they do come in contact with the poles that there would be any harmful results; and in addition to the above, should plaintiff's claim be true, then the method of protecting their wires is well known to the plaintiff and used by them, and can be done at small expense by using a bracket and insulator, or by permitting defendant to use them.

The above question is supported and denied by about an equal number in this case, and I cannot presume defendant company's line will be negligently constructed and negligently maintained. Upon this question the city council should regulate which company should furnish the bracket and insulator, etc., by ordinance.

When we take into consideration, and that must be taken into consideration, as it is in the evidence in this case, that there are a large number of companies in this city whose business is carried on by reason of wires supported by poles, and that these poles ornament nearly every street corner, it would be impossible to set 325 lamp poles, and the poles to carry the wires to said lamp poles, without coming in contact with some of these various companies and especially plaintiff's company, and because they do cross each other's paths this court cannot grant the motion alone on that ground. If the plaintiff and defendant neither had the contract for public lighting, then their rights would be co-ordinate.

On the question of estoppel this court recognizes the rule to be that if one party is proceeding to do that which interferes with the right of another, in the doing of which a large amount of money is being expended with the knowledge of the party denying the right, the party denying such right cannot safely stand by and see such expenditure made without taking immediate and proper steps to protect his rights.

I do not claim it necessary, however, to base my decision on this proposition, but on the question of *res adjudicata*. I think the rule has never been better expressed than that stated in the case of *Fischli v. Fischli*, 1st Blackford, 260, wherein it is expressed in these words: "For, whenever a matter is adjudicated, and finally determined by a competent tribunal, it is considered forever at rest. This is the principle upon which the repose of society materially depends, and it, therefore, prevails, with very few exceptions, throughout the civilized world. This principle not only embraces *what actually was determined*, but also *extends to every other matter which the parties might have litigated in this case.*" This decision has been followed, cited and approved by our Supreme Court from its begin-

ning to the present time, and no case has been more frequently cited. I find the facts in this case to be that the matters involved in this controversy not only might have been, but substantially were, litigated and determined in the Vigo Circuit Court in case No. 17,723 on the 17th day of January, 1895, and before this case was begun. And the court is of the opinion also that in law the party having the contract with the city to furnish public lights for the streets and alleys has the implied right to the use of the streets and alleys, in complying with such contract, superior to any right which any corporation or individual can have in furnishing commercial or domestic lights. This must be so, for the reason, that in law, public rights are superior to private rights. By reason of this rule of law, this restraining order cannot be continued after the first day of February, 1895, and the motion for the temporary injunction is, therefore, denied, and the restraining order heretofore made is dissolved.

NOTE.—For this opinion the editor is indebted to McMutt & McNutt Esqs., Terre Haute, Ind.

See note to next case.

WESTERN UNION TELEGRAPH COMPANY v. LOS ANGELES
ELECTRIC COMPANY.

U. S. Circuit Court, S. D. California, Aug. 3, 1896.

INTERFERENCE OF ELECTRICAL USES.

As between a telegraph company entitled to use highways by authority of its acceptance of the post-roads act of Congress of 1866, and a company organized for and engaged in the business of furnishing electric light and power, the former, having prior occupancy of a street, has the superior right.

So held in an action for equitable relief against the operating of wires so as to cause injury by induction.

It being expressly provided by the post-roads act that the franchise which it confers shall not interfere with ordinary travel, the question whether the electric lighting of a city by night so promotes this primary use of its streets as that a company engaged exclusively in the business of such lighting has, for its instrumentalities, a right of occupancy in the streets superior to the franchise acquired by the telegraph company under the post-roads act, is a question carefully to be weighed when presented for decision, but not arising in the case at bar.

In an action to restrain interference of electrical uses, complaint held sufficient to show that the threatened injury was a certain or probable result, not a mere possibility.

Cases of this series cited in opinion, appearing in bold faced-type: *Pensacola Tel. Co. v. W. U. Tel. Co.*, vol. 1, p. 250; *W. U. Tel. Co. v. Pendleton*, vol. 2, p. 49; *Mutual Union Tel. Co. v. Chicago*, vol. 1, p. 506.

FACTS stated in opinion.

R. B. Carpenter, for complainant.

Wm. A. Cheney, for defendant.

WELLBORN, District Judge: Complainant, a New York corporation, sues to restrain defendant, a California corporation, from operating the latter's line of electric wires on Second street, in the city of Los Angeles, Cal. The present hearing is on a demurrer to the bill. The

pertinent matters therein alleged, briefly stated, are these:

Complainant owns and operates a telegraph system extending through the United States, and having its connections with the other countries of the civilized world. Most of its properties in this country have been constructed and acquired since June 12, 1867, at which date complainant filed with the postmaster-general of the United States its written acceptance of the restrictions and obligations of the act of Congress of July 24, 1866, entitled "An act to aid in the construction of telegraph lines, and to secure to the government the use of the same for postal, military and other purposes," the provisions of said act being now found in the Revised Statutes of the United States (sections 5263 to 5269, inclusive). The first of these sections is as follows:

Section 5263. Any telegraph company now organized, or which may hereafter be organized, under the laws of any State, shall have the right to construct, maintain and operate its lines of telegraph through and over any portion of the domain of the United States, over and along any military or post-roads of the United States, which have been, or may hereafter be, declared such by law, and over, under or across the navigable streams or waters of the United States; but such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post-roads.

Second street, above mentioned, is a post-road. 23
Stat. 3.

Since its acceptance aforesaid, complainant has in all things, and at all times, complied with the provisions of said act. In the year 1889 complainant erected poles and strung wires thereon, and thus constructed, as a part of its general system and has since operated the same, a line along the north side of Second street in the city of Los Angeles, Cal. Over said line are sent governmental, commercial and social messages, by way of the Santa Fe route and its various branches, throughout the civilized world. In respect to the messages of the government of the

United States, complainant is the agent of said government, and, as to the messages transmitted between California and the other States of the Union and foreign countries, complainant is an instrument of interstate and foreign commerce. In May, 1895, while said line was thus in full operation, with 10 wires strung up on the cross arms of its poles, defendant constructed a line of poles in an exact line with those of complainant, and strung its wires upon the cross arms of its poles, directly under the wires of complainant's line, and in many places so near to the wires of complainant's telegraph line aforesaid as to interfere with the working of complainant's wires, in consequence of the stronger electric current sent over defendant's wires. Defendant is engaged in the business of transmitting electric currents, at various points in the city of Los Angeles, for arc lights of 2,000 and 3,000 candle power, on poles from 25 to 130 feet high, and for incandescent lights, and for propelling machinery, and its said line along Second street is to be used for all these purposes. Defendant's wires, when charged with high power currents, seriously interfere with the wires of complainant, by reason of induction, or that electrical influence which a current in one wire exerts upon another wire in close proximity. Defendant's wires, in order to transmit electrical currents for said arc lights, must be, and are, charged with very strong electrical currents—four or five times stronger than the currents used by complainant in transmitting messages over its lines. The instruments necessary to be, and which are, used by complainant in the transmission of its messages, are delicate and sensitive, and, preparatory to transmitting signals, must be carefully balanced and adjusted, in accordance with the strength of the electrical current generated by the batteries in complainant's main office, and the condition of the wires over which the signals are to be transmitted; and, therefore, the strong current sent over

defendant's wires will disarrange, distort and mutilate the telegraph signals of complainant's line, and will result in serious errors in the transmission and reception of the telegraphic messages of complainant. The breaking of complainant's wires, and their falling upon those of the defendant, as they are liable to do, would destroy complainant's instruments, and endanger the lives of its employes. The dangerous character of defendant's wires renders it difficult, if not impossible, to keep the complainant's lines in order. Complainant is operating under heavy penalties to the United States government, and is liable to its employes for personal damages. The grounds of the demurrer, as therein stated, are as follows:

“(1) That the complainant hath not, in and by its said bill, made or stated such a case as entitles it, in a court of equity, to any relief against defendant as to the matters contained in the said bill, or of any such matters. (a) It does not set forth, state or allege that this defendant prevented, or has been preventing, or will prevent, the complainant from using the post-roads, or any of them, of the United States. (b) It does not appear from its said bill that the complainant has not a speedy and adequate remedy at law, or that it will suffer irreparable damage by any act on the part of this defendant. (c) The said bill does not show any exclusive right in this complainant, as against the defendant, to the use of the north side of Second street, in the said city of Los Angeles. (2) That the said bill is deficient in certainty, in that it does not in any manner show, or attempt to show, how far apart the wires of this defendant must be from the wires of this complainant in order to avoid the results of what is stated in said bill as ‘induction,’ nor how near said wires of this defendant must be to the wires of the complainant in order to cause the process set forth in the said bill as ‘induction.’ (a) And further, that the said bill does not state or allege

that this defendant has in any manner interfered with the wires of this complainant."

Complainant's franchise, by virtue of the act of Congress of July 26, 1866, to construct, maintain and operate a line on Second street, is conceded; but the defendant insists that said franchise is subject to reasonable local regulations, and does not include exemption from the burdens ordinarily cast upon those who exclusively appropriate parts of a public highway. *Pensacola Tel. Co. v. W. U. Tel. Co.*, 96 U. S. 1; *Telegraph Co. v. Pendleton*, 122 U. S. 359; *Mutual Union Tel. Co. v. City of Chicago*, 16 Fed. Rep. 309. While these authorities appear to sustain the limitations suggested by defendant, the facts of the case at bar do not raise for decision any question connected with such limitations. The material contention made in defendant's brief is that the bill does not show such an unlawful interference by defendant's wires with complainant's business as entitles the latter to equitable relief, because: First, the threatened injury is only a remote possibility, and not a certain or probable result; second, so far as concerns the right to occupy a street, the business of furnishing a city and its inhabitants with light is a higher use than that of telegraphing, and therefore defendant's right of occupancy is superior to that of complainant. These two points will be examined in the order in which they are stated.

1. In support of its first contention, defendant suggests that there is no statement in the bill of the distance at which an electric current upon one wire will affect, by induction, another wire. This, I think, is a matter of evidence which need not be specifically set forth. The ultimate fact, in this connection, essential to complainant's case, and which should be alleged, is that defendant's wires have been placed so near to complainant's wires as to seriously impair the efficiency of the latter; and this

situation, I think, is sufficiently shown. The bill alleges as follows:

"Said defendant has placed its poles in an exact line with those of your orator on said Second street, and its wires, so far as they are strung, and in so far as they will be strung if the line of defendant is continued to Alameda street, are directly under the wires of your orator, and in many places so near to the wires of the telegraph line of your orator aforesaid as to interfere with the working of your orator's wires, in consequence of the stronger electric current sent over the wires of said defendant, the Los Angeles Electric Company."

Furthermore, the bill, after alleging that the electrical currents to be transmitted over defendant's wires will be much stronger than those used by complainant, and that the instruments necessarily employed by complainant in the transmission of messages are delicate and sensitive, and must be adjusted with reference to the current generated by the batteries in its main office, and the conditions of the wires over which the signals are to be transmitted, proceeds thus:

"And, therefore, the induced current over the defendant's line will disarrange, distort and mutilate the telegraphic signals of your orator's line, by interposing a foreign and stronger current, not under the control and not within the knowledge of the transmitting operator, and will result in serious errors in the transmission and reception of the telegraphic messages of your orator."

From these quotations it appears the bill does expressly and directly allege that the operation of defendant's line will seriously and prejudicially affect complainant's line.

2. Defendant contends in the next place that the lighting of a street is necessary to its primary use—travel—and that, therefore, an electric light company carrying on the business of such lighting has a paramount right of occupancy, as against a claim not founded upon such primary

use. I have been able to find but one authority on this question, and that one is against the defendant, and expressed as follows:

"Sec. 223. *Telegraph v. Electric Light*. The use of the same street, or side of the street, for both telegraph and electric light wires, may bring up a question of which of the two uses of electricity is entitled to the precedence. The electric light wires carry, as is well known, a heavy and dangerous electric current, which may, in case of sagging or breaking of the electric light or telegraph wires, be distributed over the telegraph wires, and burn out the instruments, and endanger the lives and safety of the employes of the telegraph company. On the other hand, the wires may be so adjusted that both companies can use the same side of the street with safety. The question which of the companies must make this adjustment of its wires depends upon the question of which company was prior in its occupation of the streets with its wires. If the telegraph company has strung its wires along the street, and is carrying on the telegraphing business, the electric light company cannot, even under a municipal ordinance granting it such power, string its wires within such distance of the wires of the telegraph company, or in such a manner as to create a danger such as has been specified above, and a court of equity will enjoin the electric light company from so stringing its wires. On the other hand, if the electric light company has already strung its wires, and is operating them, the telegraph company cannot compel it to remove them so as to allow it to occupy the street, even under the franchise and protection of the act of Congress of July 14, 1866 (Rev. St. U. S. sec. 5263), unless in no other way can it avail itself of this franchise." *Crow. Electricity*, p. 194.

This author seems to consider the two uses of telegraphing and electric lighting, so far as concerns their respective privileges in a street capable of sustaining both uses, of

equal necessity, and, therefore, that prior occupancy gives the better right. Without deciding the point involved, I will say that defendant's argument, although opposed by the text quoted, would not, if defendant's sole business was that of lighting the streets, be without force. The act of Congress of July 24, 1866, hereinabove mentioned, expressly provides that the franchise which it confers shall not interfere with "ordinary travel." Whether the electric lighting of a city by night so promotes this primary use of its streets as that a company engaged exclusively in the business of such lighting has, for its instrumentalities, a right of occupancy in the streets superior to the franchise acquired by a telegraph company under the aforesaid act of Congress, is a question carefully to be weighed when presented for decision. It does not arise, however, in the case at bar, as the defendant is engaged in transmitting electricity, not only for lighting purposes, but also for propelling machinery. As against this latter use, a franchise acquired under said act of Congress, I think, confers a superior right where the right, as here, is fortified by prior occupancy. The demurrer is overruled, and the defendant assigned to answer the bill at the rule day in September next.

NOTE.—See note, vol. 5, p. 264, for reference to earlier cases in this series upon the interference with each other of electrical uses of streets, of which the two preceding cases are examples.

VOL. VI—14.

WESTERN UNION TELEGRAPH COMPANY OF BALTIMORE
CITY AND CITY AND SUBURBAN RAILWAY COMPANY V.
STATE, TO USE OF EDWARD NELSON.

Maryland Court of Appeals, Jan. 8, 1896.

INJURY BY ELECTRIC SHOCK.—CONCURRENT NEGLIGENCE.

The privilege granted to electrical companies by State or municipal authorities, to incumber public highways with appliances likely to endanger the traveling public, unless properly employed and controlled, imposes upon them the duty of so managing their affairs as not to injure persons lawfully in the streets—to make the traveler's lawful use of the street substantially as safe as it would be without such appliances. Therefore the fact that a person is injured by the appliances of such companies when not in proper condition raises the presumption that the companies were negligent.

A traveler having been shocked and burned by contact with a telephone wire which had broken and fallen across the feed wire of a trolley railway and thence to or near the ground, *held*, that evidence that the wire had so hung for two weeks; that it was swayed by the wind causing it to rub against the insulating material of the feed wire; that such rubbing for so long would materially injure the insulation; was evidence, especially in absence of any to the contrary, that the telephone wire became charged through the feed wire.

Judgment for plaintiff against both companies in an action against them jointly sustained.

Cases of this series cited in opinion, appearing in bold faced type: *Haynes v. Raleigh Gas Co.*, vol. 5, p. 264; *Uggle v. West End St. Ry. Co.*, vol. 4, p. 389; *S. W. Tel. & Teleph. Co. v. Robinson*, vol. 4, p. 342; *Blanchard v. W. U. Tel. Co.*, vol. 1, p. 176.

APPEAL by defendant from judgment of Baltimore City Court.

W. Irvine Cross, John K. Cowen, and E. J. D. Cross, for appellants.

Isidor Rayner and Isaac L. Straus, for appellee.

PAGE J.: This action was brought against the Western

Union Telegraph Company and the City & Suburban Railway Company, to recover damages for the alleged neglect of the defendants, whereby one Michael Nelson lost his life.

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The remaining exceptions present for our consideration the several instructions granted and rejected by the court, and this renders necessary a statement of the main facts of the case. On August 24, 1893, Michael Nelson, a child of 11 years, while walking on Eastern avenue near Luzerne street, came in contact with a telephone wire which hung from a pole owned and controlled by the Western Union Telegraph Company of Baltimore City. Along that part of Eastern avenue the City & Suburban Railway Company operates one of its lines of electric railway. Its iron poles are placed at intervals along the curb line, and carry wires strung across the street to support the trolley wire in the middle of the street. Besides these, they also support the railway's feed wires, which stretch from pole to pole along the street, over the curb line and parallel to it. The function of these feed wires is to supply electricity to the trolley wire, so that the potential of that wire may be always constant; and when the road is being operated they carry a voltage of 500 volts, sufficient to produce upon anyone receiving it serious injury or death. By means of a preparation of braided cotton, saturated with insulating material, and covered with a waterproof compound, feed wires are kept insulated, so that, when the insulation is properly done, and in good condition, there can be no escape of electricity. If exposed, however, long to atmospheric influence, it becomes depreciated, and will not serve its purpose. Defects are also sometimes to be attributed to improper handling of the wire in the process of construction, so that the covering becomes broken, and the frictional contact of another wire rubbing against it would cause serious damage to the insulation, and in such a case

the current would commence to be carried through before the insulation was "probably absolutely worn through." If imperfect insulation were due to such rubbing, so that the charged wire was laid bare, or so worn that the current found a path to the overhanging wire, there would be no sparks at the point of contact, unless there was an "arcing or air space" between the two. The defendant offered evidence tending to show that the particular feed wire was erected in 1893. It was not contended that the insulating material was not of the best, or that it was not originally put up in a proper manner. The defendants also offered evidence to show that at the time of the accident the insulating material was intact at the place where the telephone wire rested on it. It was shown the swinging wire did not belong to the telegraph company, but was suspended from a bracket or lug on one of its poles. It was erected, with the permission of the company, by a gentleman for his private uses. It had long been unused, but was permitted by the company to remain, a dead wire, on the poles where it was first placed. In some manner it parted, and one of the ends, suspended from the lug, passed over or around the feed wire, and extended to the pavement, where it swayed to and fro in the wind. In this position it remained for at least two weeks. At first, it seems not to have been charged with electricity, for a policeman, at some time during that period, gathered up the swinging end and placed it in a tree box near by, so as to get it out of the way of persons passing along the street. The unbroken portion of the wire passed along for some distance into the city, but, further than to show there was no contact with other wires for two squares, there was no evidence tending to prove that it received its deadly charge elsewhere than at the place where it crossed the feed wire. It is not contended that Nelson was guilty of contributory negligence. How he came in contact with the wire does not clearly appear. Some of the witnesses

thought it was blown against him by the wind. However that may be, it passed between his fingers, and as he recoiled from the shock he drew it about his neck and throat. He was badly burned. In a few days, lockjaw set in and he died. At the conclusion of the plaintiff's testimony, the court was asked by the defendants to instruct the jury that there was no legally sufficient evidence to show that the death of Nelson was caused by the negligence of the defendants, or either of them; and this the court refused to do. To entitle the plaintiff to recover, it was requisite that the proof should establish some duty on the part of the defendants in respect to the person injured, and that the injury was 'occasioned by reason of the failure of the defendants to perform that duty. This principle is stated in *Maenner v. Carroll*, 46 Md. 212, as follows: "To constitute a good cause of action, in a case of this nature, there should be stated a right on the part of the plaintiff, a duty on the part of the defendant in respect to that right, and a breach of that duty by the defendant, whereby the plaintiff suffered injury." Now the deceased, at the time of the injury, was upon a public highway, at a spot where he had a right to be, and was going along it, to his home, in a lawful and proper manner. The sidewalks of the streets in a city are for the use of all persons who have occasion to pass along them, and Nelson, while in the exercise of this unquestioned right, was entitled to be protected and safe from all injury on account of dangerous obstructions. On the other hand, both of the defendants were using the streets, under the permission of the State and municipal authorities, for purposes of private gain, by means of agencies such as could and would become dangerous to human life if not properly and carefully employed. The railway company pursued its business by means of cars propelled by electricity partially supplied through feed wires over and along the edge of the pavement. The telegraph company had its poles also along

the curb line, and its wires, extending along the street, were over and along the feed wire, which, though insulated, carried a deadly current. The privilege so granted thus to incumber the public highway with appliances so likely to become dangerous to the public safety, unless properly employed and controlled, imposed upon them, and each of them, the duty of so managing their affairs as not to injure persons lawfully on the streets. They owed it to Nelson that his lawful use of the street should be substantially as safe as it was before the telegraph and railway plants had so occupied it. It was their plain duty, not only to properly erect their plants, but to maintain them in such condition as not to endanger the public. It follows from this that if the property of the defendants was not in proper condition, and by reason thereof Nelson was injured, these facts alone, in the absence of other evidence to show that the defect originated without the fault of the companies, afford a *prima facie* presumption of negligence. In such a case the doctrine of *res ipsa loquitur*, ("a simple question of common sense." Whitt. Smith Neg. 423) fairly applies. In the leading case of *Kearney v. Railway Co.*, L. R. 5 Q. B. 411, affirmed in the exchequer chamber (L. R. 6 Q. B. 759), and cited approvingly in *Howser's case*, 80 Md. 148, COCKBURN, C. J., said: "Where it is the duty of persons to do their best to keep premises or a structure in a proper condition, and we find it out of condition, and an accident happens therefrom, it is incumbent upon them to show that they used that reasonable care and diligence which they were bound to use, and the absence of which, it seems to me, may fairly be presumed from the fact that there was the defect from which the accident has arisen." In *Byrne v. Boadle*, 2 Hurl. & C. 722, also cited in *Howser's case*, the plaintiff, while walking in the street, was injured by a barrel falling from an upper window of a warehouse belonging to the defendant, and on these facts alone it

was held there was evidence of negligence to go to the jury. In *Thomas v. W. U. Tel. Co.*, 100 Mass. 156, where two horses driven along the highway became entangled in a telegraph wire, swinging across a public way at such a height as to obstruct and endanger ordinary travel, it was held these facts alone, unexplained and unaccounted for, were evidence of neglect on the part of the company, and should have been submitted to the jury. *Haynes v. Raleigh Gas Co.* (N. C.), 19 S. E. 344; *Ugla v. West End St. Railway Co.*, 160 Mass. 353; 2 Thomp. Neg. 1220, *et seq.*; Thomp. Elect. § 178; *Southwestern Telegraph & Telephone Co. v. Robinson*, 50 Fed. 813; *Stephens & C. Transp. Co. v. W. U. Tel. Co.*, 8 Ben. 502, Fed. Cas. No. 13,371; *W. U. Tel. Co. v. Eyser*, 2 Colo. 163; *Blanchard v. W. U. Tel. Co.*, 60 N. Y. 510; *Wolfe v. Erie Tel. & Teleph. Co.*, 33 Fed. 322.

Was there evidence before the jury, when these instructions were asked, from which they could find that the property of the defendants was out of proper condition at the time of the accident, and that by reason thereof Nelson was injured? There was evidence that the telephone wire had been hanging over the feed wire for at least two weeks; that in that position it was swayed by the wind, causing it to rub against the insulating material; that such rubbing for two weeks would cause a very serious damage to the insulation. No information had been given to the jury of any means by which the telephone wire was charged, otherwise than from the feed wire, and that could have been possible only by a defect in the insulation. This was, assuredly, evidence tending to prove that the telephone wire was charged through the feed wire. Whether sufficient, or not, to establish it as a fact, was for the jury to determine. It was within the province of the defendants to rebut the plaintiff's case in any manner they were able—to show that the insulation was perfect; or, if that could not be done, that the defect was caused

by circumstances over which they had no control; or that it existed for so short a time that they could not be reasonably expected to have been informed of it, and thereby have had an opportunity to mend it. To raise the presumption of negligence in this case it was not necessary for the plaintiff to negative all possible circumstances which could excuse the defendants. If the jury were informed of but one point where the telephone wire was in contact with a live wire, it would not be a wild speculation for them to infer—it would not, in view of all the circumstances, and in the absence of any evidence of contact elsewhere with the feed wire, or with other live wires—that that was the source from whence the electricity came, although it may have been a physical possibility that there might have been such contact with other wires further along the line. This the defendants might have shown, if they could, by way of defense; but, in the absence of all evidence on the point, the jury could infer, without violence, that the electrical charge was in fact obtained by contact of the telephone wire with the feed wire. We find no error in the rejection of the instructions set out in the third exception. We deem it unnecessary to refer particularly to the action of the court in granting or rejecting the other prayers in the case. What we have said is sufficient to dispose of them. We are of opinion the case was fairly put to the jury. Finding no error in the rulings of the court, the judgment will be affirmed. Judgment affirmed.

NOTE.—See note to *East Tenn. Teleph. Co. v. Simms' Adm'r*, post.

CITY ELECTRIC STREET RAILWAY COMPANY v. GEORGE CONERY.

Arkansas Supreme Court, December 14, 1895.

(61 Ark. 381.)

INJURY BY ELECTRIC SHOCK.—CONCURRENT NEGLIGENCE OF TELEPHONE AND ELECTRIC RAILWAY COMPANIES.—EVIDENCE.

Plaintiff having been injured by shock from a telephone wire which had broken and fallen upon a trolley wire located beneath it, *held*, that the injury was due to the concurring negligence of the owners of both the wires; of the owner of the telephone wire in permitting it to fall and remain across the trolley wire; and of the street railway company in allowing the telephone wire to become charged by contact with the trolley wire. There being three and only three electric wires, one above another in a street, the highest an electric light, the second a telephone and the third a trolley wire; there being also no evidence that the electric light wire ever sagged upon or touched the telephone wire; and a person in the street having been shocked by electricity from a broken telephone wire; *held*, that these facts warranted the inference that the telephone wire received its current from the trolley wire, without direct evidence of their actual contact.

Cases of this series cited in opinion, appearing in bold faced type: *Uggle v. West End St. Ry. Co.*, vol. 4, p. 889; *Haynes v. Raleigh Gas Co.*, vol. 5, p. 264; *Texarkana Gas, etc. Co. v. Orr*, vol. 5, p. 272; *Shelton v. United Elec. Ry. Co.*, vol. 8, p. 477; *Block v. Milwaukee St. Ry. Co.*, vol. 5, p. 293.

J. M. Rose and J. F. Loughborough, for appellant.

H. F. Auten, for appellee.

BATTLE, J.: The City Electric Street Railway Company is a corporation, and operates a street railway in the city of Little Rock, in this State, by means of electricity. Its railway traverses an extensive territory, and extends through many streets. One of the appliances used in its

operation is a trolley wire, suspended by means of poles, and charged with strong currents of electricity. A part of the railway was constructed in Fourth street. Above it were suspended the trolley wires. Intersecting Fourth street at right angles is Cross street, running north and south, while Fourth runs east and west. At the southwest corner of Fourth and Cross, O. E. White resided. Three blocks distant, on the corner of Markham and Cross streets, was a drug store, which he owned and occupied. The residence and store were connected by a private telephone wire, which was suspended by passing it through loops of wire attached to insulators on poles, and was extended over the trolley wire of the street railway at Fourth and Cross streets, its distance above it, at the lowest point, being between six and twelve feet. In the course of time the telephone wire began to sag, sagged two or three feet between poles, and was finally broken near the corner of Markham and Cross by two electricians attempting to make it straight. The broken end was tied to a post, and in a few days became untied or was again broken at or near the same place, and hung suspended in the street, the north end resting upon the ground. Two days afterwards Arthur Conery, a lad of about 10 years—playing, perhaps, in the street in front of the home of his father and mother—stepped upon it, and was shocked, thrown down, and burned. His mother, hearing his cries, went to his rescue, and, attempting to relieve him, was likewise thrown down. A workman laboring near by next went to his assistance, and cut the wire and relieved him. After this he sued White and the railway company for damages, recovered a judgment for \$300, and the company appealed.

The appellant denies that the evidence shows that the trolley communicated to the telephone wire the electricity with which it was charged when appellee was shocked and burned. It says that it was not proved "that there was any contact between the two wires." It is true that there

was no positive evidence to that effect, but there was only one other electric wire in that vicinity, and it was an "electric light wire," which was suspended above the telephone, and there is no evidence that it ever sagged or fell sufficiently low to come in contact with any wire below it. According to the evidence, there is only one reasonable theory upon which the condition of the telephone wire at the time appellee was injured by it can be accounted for; and that is, it came in contact with the trolley wire, while down, and received the electricity with which it was charged at the time. This fact is sufficient to sustain the verdict in that respect.

This fact being established, the next question is, upon what duty of the appellant to the appellee can this action be based? The answer to it is, upon the duty enjoined by the rule which requires every one to so use his property as not to injure another. The applicability of this rule may be shown by many illustrations. One is where an owner of a vicious animal, accustomed to do hurt, knowing his habits, negligently allows him to escape. He is responsible for the mischief the animal does, because it was the duty of the owner to keep him secure. So it is lawful for any person to gather water on his own premises for use, for full and ornamental purposes, but it is his duty to construct the reservoirs for that purpose with sufficient strength to retain the water under all circumstances which can reasonably be anticipated, and afterwards to preserve and guard them with due care. "For any negligence, either in construction or in subsequent attention, from which injury results, parties maintaining such reservoirs must be responsible." It is the duty of railway companies to keep their tracks and rights of way free from inflammable matter, so as to prevent the communication of fire from their locomotives to adjoining property, and for a failure to discharge this duty they are liable for injuries occasioned by the neglect.

This rule applies with equal force to electric companies. They are bound to use reasonable care in the construction and maintenance of their poles, cross arms and wires, and other apparatus, along streets and other highways. They are required to do so for the protection of persons and property. If they negligently allow their wires to fall or sag, or poles or other apparatus to fall, to the injury of another, they are responsible in damages for the wrong done, if the party injured is guilty of no culpable negligence contributing to the injury. *Uggle v. West End R'way Co.*, 160 Mass. 351; *Haynes v. Raleigh Gas Co.* (N. C.), 45 Am. & Eng. Corp. Cases, 225; *Western Union Telegraph Co. v. Eyser*, 91 U. S. 495.

In *Texarkana Gas & Electric Light Co. v. Orr*, 59 Ark. 215, it appeared that the defendant owned, maintained and operated in the city of Texarkana a system of electric lights. During the night of the 22nd of August, 1891, or early in the morning of the next day, its wires became disabled and out of repair, and, being either broken or disengaged from their fastenings, fell to the ground or sidewalks of the city, and lay there from 12.30 o'clock A. M. until after daylight in the morning, when the street on which they lay was thronged with people. The company ascertained that the wires were down about 2 o'clock A. M. of the same day, but not the exact locality.

Ed Walker, a boy, walking along the street about 6 o'clock in the morning of the day the wires had fallen, after some conversation with a bystander about the danger of the wires, picked up a dead wire. Being told to throw it down, he obeyed, but "flipped" it, as a witness said, into the air, as he did so; and the wire struck a live wire before he let it go, and thereby transmitted through him an electric current which killed him instantly. The company was held responsible for damages on account of the injury.

The main difference between the case last cited and this

is, the electricity was communicated to the party injured in the former by the electric company's own wire, and in the latter by the wire of another, but the principle upon which the liability is based is the same in both cases. All persons have the right to use the streets, in or over which the wires were suspended, as public highways. Subjecting the dangerous element of electricity to their control and using it for their own purposes, by means of wires suspended over the streets, it is their duty to maintain it in such a manner as to protect such persons against injury by it, to the extent they can do so by the exercise of reasonable care and diligence. This duty is not limited to keeping their own wires out of the streets, or other public highways, but extends to the prevention of the escape of the dangerous force in their service through any wires brought in contact with their own, and of its transmission thereby to any one using the streets. Only in this way can the public receive that protection due it while exercising its rights in the highways in or over which electric wires are suspended. *Electric Railway Co. v. Shelton*, 89 Tenn. 423; *Block v. Milwaukee St. Railway Co.* (Wis.), 61 N. W. Rep. 1101.

Electric companies are bound to use "reasonable care in the construction and maintenance of their lines and apparatus—that is, such care as a reasonable man would use under the circumstances—and will be responsible for any conduct falling short of this standard." This care varies with the danger which will be incurred by negligence. In cases where the wires carry a strong and dangerous current of electricity, and the result of negligence might be exposure to death or most serious accidents, the highest degree of care is required. This is especially true of electric railway wires suspended over the streets of populous cities or towns. Here the danger is great, and the care exercised must be commensurate with it. But this duty does not make them insurers against accidents,

for they are not responsible for accidents which a reasonable man, in the exercise of the greatest prudence, would not under the circumstances have guarded against. *Haynes v. Raleigh Gas Co.* (N. C.), *supra*; *Uggla v. West End Street Railway Co.*, *supra*.

In this case the cause of the accident was the falling of White's telephone wire, and the contact of the same with the trolley wire of the appellant. The jury found both of them guilty of negligence—White in permitting his wire to fall and remain down until appellee was hurt; and the appellant, in allowing the same to become charged with electricity by contact with its wire at the time of the injury. If this be true, the injury was the result of the concurring negligence of the two parties, and would not have occurred in the absence of either. In that case the negligence of the two was the proximate cause of the same, and both parties are liable. *Shear. & R. on Neg.* (4th ed.) sec. 31; *Thomp. on Neg.* p. 1088.

We have examined the evidence in this case and the instructions of the trial court based on the same. Without setting out either, it is sufficient to say that, tested by what we have said in this opinion as to the law, we find no reversible error in the instructions, taken as a whole, and that the evidence is sufficient to sustain the verdict of the jury, in this court.

Judgment affirmed.

NOTE.—See note to *East Tenn. Teleph. Co. v. Simms' Adm'r*, *post*.

McKAY & ROCHE v. SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY AND MOBILE STREET RAILROAD COMPANY.*Alabama Supreme Court, April 8, 1896.***INJURY BY ELECTRIC SHOCK.—CONCURRENT NEGLIGENCE.**

One of the plaintiffs' horses having been killed and another injured by shock from a broken telephone wire which had fallen across a trolley wire and so become heavily charged with electricity, they brought a joint action against the companies maintaining the two wires. The gist of the complaint was that it was the duty of each of the defendants to guard against contact of the wires, it being known to them both on the one hand that the telephone wire was weak, frail and insecurely fastened, and liable to fall, and on the other hand, that if it did fall upon the trolley wire, life in the street would be endangered, and that both defendants were negligent in suffering the telephone wire to become charged and so remain.

The railway company contented itself with answering that it had the right to maintain its trolley wire heavily charged with electricity; that it had charter and municipal authority to so operate; that it was not responsible for the breaking of the wire.

The telephone company pleaded in defense that its wire was in good condition, properly located and maintained, necessarily located above the trolley wire, maintained under municipal authority, placed at an earlier date than the trolley wire, charged with so low a current as to be harmless. That the trolley wire carried a high and dangerous current; that it was the duty of the railroad company to afford means to prevent contact in case the telephone wire should break and fall; that it had failed to perform this duty, and had disobeyed municipal directions to place a guard wire for that purpose; that the injury was caused by such breach of duty and disobedience.

Held, that neither of these answers met the allegations of the complaint and that demurrer to them should have been sustained.

Held, that the action was maintainable against the telephone and railway companies jointly, the alleged wrong being within their concurrent, common knowledge, contemplation and intent.

Case of this series cited in opinion, appearing in bold faced type: *Shelton v. United Elec. Ry. Co.*, vol. 8, p. 477.

APPEAL by plaintiff from judgment of Circuit Court, Mobile county.

Action for damages for alleged negligent killing of one horse and injury to another by shock from a telephone wire which had become loosened and fallen over a trolley wire and rested in part in the street. Most of the facts are sufficiently stated in the opinion, as also are the allegations of the complaint and of the pleas, or answer, of the telephone company.

The railroad company pleaded the general issue, and interposed the following special pleas:

“(2) As a plea pleaded separately to each count of said complaint, said defendant says that, at the time of the matters and things complained of, it had lawful authority to construct and operate an electric railroad over the street where the accident occurred, and, as such, to use and erect trolley wires for the propulsion of its cars, and, for the same purpose, to cause said trolley wire to be heavily charged with electricity. And this defendant avers that its trolley wire along the street where the accident occurred was erected and maintained in a manner authorized by its charter, and by the ordinance of the city of Mobile granting it a franchise over said street for said purpose; and that an overhead wire, maintained and operated by a separate and distinct corporation, with which this defendant had no connection, and without fault on the part of this defendant, did break and fall across this defendant's trolley wire, and thereby became charged with electricity, and came in contact with plaintiffs' horses, and caused the injury complained of. And this defendant further avers that it did nothing to cause said wire to so break and come in contact with its said trolley wire, nor was it guilty of any negligence that caused, or tended to cause, the breaking of said overhead wire, or its coming in contact with plaintiffs' horses. (3) For a further plea in this behalf, pleaded separately to each count of the complaint, this defendant says that it erected and maintained its trolley wire along the street where the accident com-

plained of occurred, in the manner in which it was authorized to erect and maintain the same, and in the manner in which other trolley wires are erected and maintained by many prudently and well managed electric railway companies conducting the same character of business which this defendant was conducting, over and along the streets of other cities; and that, other than the erection, maintenance and conduct of its said electric railway in manner aforesaid, it did nothing that proximately contributed to the injuries complained of."

There were demurrers to each count of the complaint and to each plea of each defendant, all which demurrers were overruled. The plaintiffs filed replications to the pleas of each of the defendants, to which replications the defendants filed demurrers, which were sustained and exception taken. The evidence presented upon the trial was in substantial accord with the complaint.

The defendant offered no evidence. Upon the introduction of all the evidence of the plaintiffs, each of the defendants separately requested the court to give the general charge in its behalf. The court gave each of these charges, and to the giving of each of them the plaintiffs separately excepted. There were verdict and judgment for the defendants. The plaintiffs appeal and assign as error the several rulings of the trial court to which exceptions were reserved.

L. H. Faith, for appellants.

Gregory L. & H. T. Smith and *Russell & Deshon*, for appellees.

HEAD, J. This is a joint action against the two appellees for damages to property alleged to have been caused by their negligence. The contest seemed to have been largely waged by and between the two defendants, each accusing

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the other, but the result was victory to both over the plaintiffs.

The complaint shows that the Mobile Street Railroad Company operated an electric street railway along Government street, in Mobile, with the electric motive power supplied by means of an overhead trolley wire, such as is generally in use, which wire was so heavily charged with electricity as to render contact with it highly dangerous to animal life. It was suspended from poles, over the middle of the street, in the usual way. Government crossed Lawrence street. The telephone company had suspended from poles, along Lawrence, crossing Government, as such wires are usually suspended, a wire which it used in its telephone business. This was stretched a few feet over and above the railway trolley wire, which it crossed. The complaint charges, in the first count, that this was a frail, weak wire, and was not securely fastened upon its poles, and was liable to break and fall upon and across the said trolley wire, and to extend down to the ground, heavily charged with electricity, by reason of its contact with the trolley wire, and thereby become exceedingly dangerous to the lives of all persons and animals passing upon and along said streets, all of which was well known to both defendants; that it was the duty of the defendants, respectively, to so maintain, guard and protect their said respective wires as to not allow the telephone wire, if it should break and fall to the ground, to come in contact with the trolley wire, and become charged with electricity from the latter; yet it is averred that, at the time of the injury complained of, the defendants failed and neglected so to do, whereby the telephone wire, which broke, fell across the trolley wire, and extended to the ground, heavily charged with electricity, communicated from the trolley wire, and with which plaintiffs' two horses, while being driven along Government street, by plaintiffs' servant, came in contact, producing electric shocks, which killed one of

them, and seriously injured the other, and did injury to the harness. The second count charges the negligence of the defendants to have been that they "wrongfully and negligently suffered said telephone wire to fall upon and across said trolley wire, and extend therefrom down to the ground, heavily charged with electricity from said trolley wire, and to be and remain in that condition." The third count charges that the negligence consisted "in suffering the telephone wire to be and remain lying upon and across the trolley wire, and extending down therefrom to, upon and across Government street, . . . heavily charged with electricity, from the said trolley wire." There were demurrers to these several counts, which were overruled. The defendants filed separate pleas. The telephone company pleaded, first, the general issue. Its second plea, as subsequently amended, set up contributory negligence on the part of plaintiffs' driver, upon which issue was joined. Its third plea averred that its wire was in good order and condition, was properly located and maintained, and was necessarily stretched across, over and above the trolley wire; that it was charged only with such a low current of electricity as to be harmless to life and property brought in contact with it. The nature and dangerous electric charge of the trolley wire, as alleged in the complaint, are repeated, and the plea avers that it was the duty of the railroad company, which it could have performed, to so construct and maintain, guard, and protect its said trolley wire as not to allow contact to be made with it and the telephone wire, if, by accident, the latter should fall where it crossed the former; yet the plea avers that the railroad company failed and neglected so to do, whereby, when the telephone wire did fall, it fell across the trolley wire, and communicated the electric current of the latter to plaintiffs' horses, doing the injury complained of by the plaintiffs. The fourth plea sets up the failure of the railroad company to obey an alleged lawfully authorized order or direc-

tion of the mayor of Mobile, requiring it and all other companies using trolley wires to guard and protect them by what is known as "guard wires." It avers that that company, by compliance with said order, in the construction of said guard wires, could have so protected its trolley wires that, in case the small telephone wire should fall, it would not come in contact with the trolley wire; and this failure is charged to have been the direct cause of plaintiffs' injury. The fifth plea is substantially the same as the third, with the addition averment that the telephone company was established and in operation along Lawrence street, crossing Government, before and at the time the railroad company constructed its road and erected its trolley wire. The sixth plea is substantially the same as the fifth, with an additional averment of municipal authority for the construction and operation of its telephone lines.

As we have seen, the complaint contains several charges of negligence against both defendants: (1) That the telephone wire was frail and weak, and not securely fastened to the poles, and was liable to break and fall across the trolley wire, &c., which facts were known to both defendants; and that it was the duty of the defendants, respectively, to so maintain, guard and protect their respective wires as not to allow the telephone wire, if it should break and fall to the ground, to come in contact with the trolley wire, etc., showing failure to observe these duties, with the result and injury. (2) That defendants wrongfully and negligently suffered the telephone wire to fall upon and across the trolley wire, etc., and to be and remain in that condition. (3) That they suffered the telephone wire to be and remain lying upon and across the trolley wire, etc.

It is plain that neither the third, fourth, fifth nor sixth plea of the telephone company answers either of these charges. The third does state that the telephone wire was in good order and condition, and properly located and

maintained; but this cannot be accepted as a denial of the allegations that, known to the defendants, it was frail and weak, not securely fastened to the poles, and liable to break and fall across the trolley wire, and that it was the duty of the defendants to so maintain, guard and protect their wires as to prevent such an occurrence. Nor is it excuse to the telephone company, derelict in these respects, that the railroad company was guilty of the negligence charged in its several pleas. Those allegations but emphasize the averments of the complaint, and accentuate the charges of the telephone company's own neglect. The fourth plea is, perhaps, more vicious than the third. It shows the violation, by the railroad company, of a lawful order of the mayor to erect guard wires to prevent just such catastrophes as now brought to view; and yet it confesses that the party pleading maintained a weak, frail wire, insecurely fastened, and, as known to both defendants, liable to fall across the trolley, and violated a duty to protect it against such consequences. And, more than this, it confesses that the party pleading, as well as its co-defendant, after the wire fell across the trolley wire, extending to the ground, charged with the dangerous current of electricity, suffered it to be and remain in that condition, causing the [plaintiffs' injury. The same may be said of the fifth and sixth pleas. The demurrers sufficiently raise these objections, and the court erred in overruling them.

It is apparent there is no answer in either of the special pleas of the defendant the Mobile Street Railroad Company to either of the charges of negligence contained in the complaint. It is not material to this controversy that the company had lawful authority to construct and operate its road with the motive power employed. It does not appear, unless by the statement of a conclusion of the pleader merely, that the charter and municipal ordinance authorized the defendant, knowing that a frail, weak,

insecurely fastened telephone wire, liable to fall across its trolley wire, and extend to the ground, carrying a deadly current of electricity to persons and property lawfully passing along the highway, was being maintained by another, to maintain and operate its own wire without taking any steps to prevent destructive consequences; and particularly does no authority appear to suffer the wire of the telephone company to be and remain lying across its own, extending to the ground. Nor is it material that the defendant had no connection with the telephone company, and that the latter's wire broke and fell without the defendant's fault, and that it did nothing to cause it to break and fall as it did. Nor does the fact that defendant erected and maintained its wire in the manner that other trolley wires are erected and maintained by many prudent and well managed electric railway companies, conducting the same character of business over and along the streets of other cities, justify it in knowingly suffering a wire to be suspended over its own, in a condition likely to fall across its own, with the attendant dangers mentioned, without providing proper safeguards, or, after its fall, suffering it to be and remain in that condition. The demurrers to these pleas ought to have been sustained.

It is said that the pleas are good, in that they show there was no joint liability of the defendants. The injurious act complained of consisted, in one aspect of the complaint, in the concurrent maintenance of two wires, so related to each other, and so erected, that the one was likely to fall across the other, producing the dangers charged. This wrong was within the concurrent, common knowledge, contemplation and intent of both defendants. Both knew that the one wire was likely to fall across the other, and cause such damage as the plaintiff sustained, and it was the common duty of both to abate the dangerous condition. It is not material by what special act or omission on the part of either, in the maintenance of its own wire, the

dangerous condition was produced. So far as concerned the public, it was the maintenance of the two wires, so related to each other, in respect of injurious consequences, that they were inseparable. Known to both defendants, the two wires mutually depended upon each other for those consequences. Whether the condition was primarily brought about by the neglect of the one or the other or both defendants, it yet existed with knowledge on the part of both, and both contributed to the continuance of its existence. The Supreme Court of Tennessee, in *Shelton v. United Electric Ry. Co.*, 89 Tenn. 423, had occasion to consider a case substantially identical with this. The opinion being short, we reproduce it, as delivered by TURNER, C. J., as follows: "Shelton's horse was killed by coming in contact with a wire of the telegraph and telephone company, which had fallen across the trolley wire of the electric railway company. The wire of the telephone company had become much impaired. The falling of a wall of a burning building broke a pole of the telephone company, breaking the wires at several points. At the point of the accident, the telephone wires crossed the railway track above the trolley. A broken wire fell across the trolley wire, and, while resting on it, the horse came in contact with it, and was instantly killed. There was no guard wire over the trolley wire. The case was tried by the circuit judge, without the intervention of a jury. The condition of the telephone wire was such as to arrest the attention of a prudent man engaged in the business of either company. The circuit judge found, under the facts, that both companies were guilty of negligence, and responsible for the loss, and gave judgment accordingly. The judgment is correct. While it was the primary duty of the telephone company to see that its wires were in a reasonably safe and sound condition, and protected against the contingency of falling, it was also the duty of the electric company to see that its trolley wire was in like

manner protected from such contingency. While it was the duty of one company not to use unsound and unprotected wires, it was equally the duty of the other not to operate its road under such defective machinery. It might as well insist that it was not responsible for damages resulting from the fall of a rock which it had constantly recognized as threatening to fall, or of a dead tree which it had frequently noticed, with decayed and giving roots, and knew would fall in the first wind or rain. The obligation to see that its road was in good repair, and its machinery in safe operating order, is not confined to the immediate and abstract presence of either, but extends to all surroundings that may depreciate the security of either. Both companies knew of the unprotected trolley wire, and the consequences of a contact of the wires of the one with those of the other. Both were bound to guard against such likelihood, and, having failed to do so, are liable."

It is unnecessary to discuss the joint liability of the two defendants under the phase of the complaint which charges that they suffered the wire of the one, after falling, to be and remain across and in contact with that of the other, causing the injury. It is too clear for discussion that such liability is joint. The pleas were interposed to the whole complaint.

The special replications bring forward nothing new, and were improperly interposed. They might well have been stricken from the file. They will probably not be insisted upon.

There does not appear to have been any real question upon the trial as to the operation of the railway and telephone lines by the defendants, respectively; and the plaintiffs omitted to make direct proof thereof, at least as to the telephone company. There is clearly sufficient evidence, howsoever weak, to send the question to the jury as to the operation of the railroad by the Mobile Street Railroad Company at the time of, and for months prior to,

the injury, and to authorize an inference by the jury of a failure of duty, as alleged, on the part of the company, proximately causing the injury. As to the telephone company, there was evidence tending to show that a telephone wire was being, and had been for months before the injury, maintained as alleged in the complaint, and that it fell across the trolley wire as alleged. The defendant, the Southern Bell Telephone & Telegraph Company, being sued and charged with maintaining the wire, came into court by counsel, and entered upon a trial of the general issue, as well as of special issues. So, also, as to the other defendant, the Mobile Street Railroad Company. The conduct of the trial by these defendants from beginning to end; the character and manner of the development and production of the testimony; the cross-examination of the plaintiffs' witnesses; the absence of a suggestion express or implied in the conduct of the trial on the facts that any other than the defendants maintained and operated the wires respectively—all tended to show an implied admission that they were the parties and authorized the jury so to infer. It is certainly true that the plea of the general issue puts in issue all the material allegations of the complaint, and imposes upon the plaintiffs the necessity of proving them. But the rule is a reasonable one. No set form of proof is prescribed. The defendant may, by his course of conduct on the trial, show to the satisfaction of the jury that he does not really controvert a particular fact strictly within the issue, but waives formal proof thereof; and in such a case it should be left to the jury to say whether it is waived or not. Suppose an extrajudicial investigation, of precisely the same nature and incidents as the trial in question, had occurred by and between the parties to this suit in reference to this subject, would not the conduct of the defendants thereon be admissible, upon a subsequent judicial investigation of the matter, to authorize the inference of an implied admission

that they were the parties who maintained the wires? We think so. We will not, therefore, declare that the rulings upon the pleadings were erroneous without injury.

The city ordinance which was excluded may be so connected on another trial as to render it admissible, if it was not on the trial appealed from.

Reversed and remanded.

NOTE — See note to *East Tenn. Teleph. Co. v. Simms' Adm'r. post.*

WILLIAM E. CLARK V. NASSAU ELECTRIC RAILROAD COMPANY.

N. Y. Supreme Court, Appellate Division, Second Dept., October, 1896.

(9 App. Div. 51.)

INJURY BY SHOCK FROM ELECTRIC RAILWAY TRACK.

The facts that a horse stepped on the rail of a trolley road and immediately fell to the ground in a dying condition, also that its driver, touching the hames, received a severe shock, *held*, to be *prima facie* proof of defective insulation and so of negligence on the part of the railway company.

MOTION for new trial on case and exceptions ordered to be heard at Appellate Division, in the first instance, upon the dismissal of the complaint directed by the court after trial by court and jury at Kings County Court.

Abram H. Dailey and James D. Bell, for the plaintiff.

James C. Church, for the defendant.

WILLARD BARTLETT, J. : The defendant maintains an electric railway in Brooklyn, which passes through Thirty-ninth street. According to an expert electrician, who was a wit-

ness for the plaintiff, the trolley wire is the positive and the rails form the negative pole; and the current in the ordinary operation of the cars passes from the overhead wires to the motor and from the motor to the wheels and from the wheels to the track. The overhead wires are insulated so as to prevent the positive current from being conveyed away through the supporting trolley poles to the ground. This being the condition of things, the plaintiff, an expressman, was driving through Thirty-ninth street on August 21, 1895, when his horse stepped on one of the rails of the defendant's electric line with his left foot, sprang suddenly up into the air and fell down upon the track dying. The plaintiff, as he testifies, jumped out of his wagon, and rushing to the horse's head seized the hames, when he himself received a shock which distorted his hands and produced in them a sensation of numbness that lasted several weeks. The horse died in a few minutes.

The present suit was instituted in the County Court of Kings county to recover damages for the loss of the animal, whose value was proved to be from \$100 to \$250. The learned trial judge dismissed the complaint, holding that the action could not be sustained, and saying to plaintiff's counsel: "This road was lawfully constructed and there is no proof in the case that there was any fault in its construction or that in its running there was any negligence. I think you are bound to show at least some fact from which an inference of negligence could be drawn. I am of opinion that it would be mere speculation for the jury to say that this shock was the result of negligence or inaction or want of repair on the part of this defendant."

We find it impossible to take the same view of the proof. On the contrary, we think there was clearly enough in the plaintiff's evidence to call upon the defendant for some explanation of the accident. That evidence amply warranted the inference that the horse was killed by an electric shock received from some source. The defendant

confessedly had established, and was operating, a railway which employed electricity in wires over the street and in wires upon its surface. Here were sources from which, or agencies by which, an electric current could be generated, under such conditions and with such direction and force, as to be capable of killing a horse traveling along the road-bed and touching one of the rails with his foot. It is true, the expert testimony indicated that such an accident could not occur unless, through the defective insulation of the overhead wires, some portion of the positive current was withdrawn therefrom and found its way into the ground or other surface upon which the animal was stepping at the time he also came into contact with the negative rail; but the very accident itself tended to show that such defective insulation existed or some other condition which would produce the same effect. The plaintiff, or any other traveler suffering a similar misadventure, could have no means of ascertaining the precise state of the defendant's plant in respect to insulation or in respect to contact with other sources of electrical energy. The fact that the defendant brought electricity into the street for use as a motive power and the fact that electricity so employed was capable of escaping in such a way as to produce the casualty which actually took place were sufficient, taken together, to justify the inference that the accident was due to the agency of the defendant, in the absence of proof that it was otherwise caused. The maxim *res ipsa loquitur* is directly applicable. *Scott v. London & St. Katherine Docks Co.*, 3 Hurlst. & Colt. 596; *Kearney v. London, Brighton, etc., Ry. Co.*, L. R., 5 Q. B., 411; S. C. 6 id. 759. The learned counsel for the respondent in his brief apparently assumes that this doctrine cannot be invoked unless the facts are such as to exclude every hypothesis but that of the defendant's negligence, and argues that the railroad in Thirty-ninth street might have been in perfect order and that the accident

might have been occasioned by the carelessness of third persons engaged in stringing telegraph or telephone or electric light wires. But the rule is one which relates merely to negligence *prima facie*, and it is available without excluding all other possibilities. The case of the warehouseman who stores barrels furnishes a good example of the proper application of the doctrine. "It is the duty of persons who keep barrels in a warehouse to take care that they do not roll out," said Chief Baron POLLOCK, in *Byrne v. Boadle*, 2 Hurlst. & Colt. 722, "and I think that such a case would, beyond all doubt, afford *prima facie* evidence of negligence." And yet, while proof of injury to the plaintiff by the fall of such a barrel would sustain a verdict in his favor against the warehouseman, and the absence of a sufficient explanation constituting a defense, nevertheless the *prima facie* case might be completely overcome by evidence in behalf of the defendant, who might prove, for instance, that the accident was wholly due to the malicious act of a trespasser upon his premises. So in the case of *Kearney v. London, Brighton, etc., Ry. Co.*, *supra*, where the plaintiff was injured by the fall of a brick from a railway bridge just after a train had passed over it, it was held that the accident itself gave rise to a presumption of negligence, notwithstanding the possibility that the brick might have been loosened by the action of frost or some sudden change in the temperature operating so rapidly that the utmost care could not have prevented its fall. The doctrine of *res ipsa loquitur* simply calls upon the defendant after proof of the accident to give such evidence as will exonerate him, if any there be, and relieves the plaintiff from the burden of proving the non-existence of an adequate explanation or excuse.

We are asked wholly to discredit the plaintiff's evidence because there is some testimony in the record to the effect that an electric shock sufficient to have killed his horse would have left marks on the animal's body. As

to this point it is sufficient to say that the case does not show whether there were any scars on the horse or not.

The exceptions must be sustained and a new trial granted, with costs to abide the event.

All concurred.

Exceptions sustained and new trial granted, costs to abide the event.

NOTE.—See note to *East Tenn. Teleph. Co. v. Simms' Adm'r*, post.

SUBURBAN ELECTRIC COMPANY, Plaintiff in Error, v.
EDWARD NUGENT, ADMINISTRATOR, &c., OF CHRISTIAN
OTTO, deceased, Defendant in Error.

New Jersey Court of Errors and Appeals, June 16, 1896.

(58 N. J. 658.)

INJURY BY ELECTRIC SHOCK.—NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE.

The dead body of a policeman was found at the foot of an electric light pole upon which, at about the level of a man's head, was fastened a reel containing an uninsulated wire rope, heavily charged with electricity. The man had a fresh burn upon his hand and his blood was in the condition usual to persons who have died from electric shock. *Held*, sufficient proof that his death was caused by shock received by contact with the wire rope.

The maintenance of such reel and wire in such location and condition, *held* to be a gross neglect of the duty which the company owed the traveling public.

Contributory negligence will not be presumed from the mere fact of the decedent having come into contact with the wire, he having the right to presume that the street was free from dangerous obstacles.

APPEAL by defendant below from judgment of Circuit Court, Union county.

Foster M. Voorhees and Frank Bergen, for the plaintiff in error.

Richard V. Lindabury, for the defendant in error.

GUMMERE, J.: Christian Otto, the intestate of the defendant in error, was a member of the police force of the city of Elizabeth, and, at the time of his death, was engaged in patrolling Washington avenue and other streets in that city. His dead body was found lying upon the corner of Washington avenue and Pearl street, about three feet from the base of one of the electric light poles of the plaintiff in error, which was standing there. This suit was thereupon brought by the defendant in error against the electric light company to recover from it the pecuniary loss sustained by the widow and children of the intestate by reason of his death; the plaintiff's claim being that decedent's death was caused by an electric shock, received from an exposed wire upon the said electric light pole, and due to the improper construction and maintenance of the defendant company's electric light plant at that point.

On the trial, at the close of the plaintiff's case, there was a motion to nonsuit, which was refused by the trial court, and, upon this refusal, error is assigned. The grounds upon which, it is claimed, the motion to nonsuit should have prevailed, are—*first*, that the evidence failed to show anything more than that the defendant was possibly responsible for the death of Otto; and, *second*, that, if it be considered that the evidence warrants the conclusion that his death was attributable to the defendant, the facts also demonstrate that he contributed by his own negligence to the accident which caused his death.

It must be conceded that the plaintiff below was bound to show something more than that the defendant was possibly responsible for the decedent's death, in order to entitle him to a verdict.

It was incumbent upon him, in the absence of direct evidence of that fact, to show not only the existence of such possible responsibility, but the existence of such circumstances as would justify the inference that the death was caused by the wrongful act of the defendant, and would exclude the idea that it was due to a cause with which the defendant was unconnected. *Bond v. Smith*, 113 N. Y. 378; *Houston v. Traphagen*, 47 N. J. Law, 23. And this, it seems to me, he has done. No one was present when the decedent came to his death, and therefore there was no direct evidence to show how it was caused; but it appeared, from the plaintiff's proofs, that there was fastened upon the pole, at the foot of which decedent's body was found, a reel, around which was wound a wire rope used for the purpose of raising and lowering one of the defendant's arc lamps; that the reel was about on a level with the top of a man's head; and that the wire rope around it was practically uninsulated, and was heavily charged with electricity. It also appeared that the *post mortem* examination of decedent showed all his organs to have been in a normal condition; that his death was not caused by disease of any kind; that there was upon his left hand, and running all the way across it, a freshly made burn, about one-sixth of an inch in width; and that the blood was in an abnormal state, its condition being such as is found in the bodies of persons who have died from electric shock.

These facts, unexplained, not only make it reasonable to suppose that the decedent came to his death through having touched with his hand the uninsulated wire upon the reel which was fastened to the defendant's electric light pole, and thereby received a fatal shock, but exclude any other inference. For such a death, the defendant was plainly responsible. It was using, in the public streets of Elizabeth, an agency dangerous to human life; and it was bound to take every reasonable precaution to protect the

public, while using those streets, against injury from that agency. The maintaining upon a reel, which was fastened to an electric light pole so near the ground as to be within easy reach of an uninsulated wire heavily charged with electricity, was, in my judgment, a gross neglect of the duty which it owed to the public.

The first ground upon which the refusal to nonsuit is attacked is without force, and cannot prevail.

Nor is the objection that the decedent's own carelessness contributed to the injury which caused his death more tenable. There was nothing in the plaintiff's case to show under what circumstances he received the shock which killed him, and nothing therefore, upon which his negligence could be predicated. It did not appear that he had knowledge that the wire was not properly insulated, or that it was charged with electricity, and he, as well as every other member of the public, was justified in presuming that this company had so constructed its electric light line, and was so maintaining it, that it would not be a source of danger to persons using the street. *Durant v. Palmer*, 5 Dutcher, 544; *Houston v. Traphagen*, *supra*.

Whether the decedent was guilty of negligence in coming into contact with this live wire depended entirely upon the circumstances under which it was done. Such negligence cannot be presumed from the mere fact of his having done so and, as there was nothing else in the plaintiff's case to indicate carelessness on the part of his intestate, the motion for nonsuit was without support on this ground also.

The judgment of the Circuit Court should be affirmed.

For Affirmance—THE CHANCELLOR, CHIEF JUSTICE, DEPUE, DIXON, GARRISON, GUMMERE, LIPPINCOTT, LUDLOW, MAGEE, BARKALOW, HENDRICKSON, NIXON, 12.

For Reversal—None.

NOTE.—See note to *East Tenn. Teleph. Co. v. Simm's Adm'r*, *post*.
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NORA DILLON V. ALLEGHENY COUNTY LIGHT COMPANY.

Pennsylvania Supreme Court, January 4, 1897.

INJURY BY ELECTRIC SHOCK.—NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE.

The fact that an electric company permitted a dead, useless and uninsulated wire to remain upon its poles, in a street crowded with live wires, although knowing that it was liable to break and carry the current to the ground by falling across a live wire, *held*, to warrant a finding of negligence.

The act of a policeman on duty, in attempting with his mace to push aside such a wire, which had broken and was hanging in dangerous proximity to a street crossing and emitting sparks, thus showing that it was charged, *held*, not contributory negligence as matter of law.

APPEAL by defendant from judgment of Allegheny County Court of Common Pleas, for damages for the death of plaintiff's husband, a policeman, who was killed by an electric shock received while attempting to remove from a street crossing a broken wire, charged with electricity from live wires across which it had fallen.

The opinion of the trial court in overruling the motion for a new trial was as follows:

"The jury have found, upon sufficient evidence, that the defendants permitted a dead and useless wire to remain upon their poles, on a street crowded with charged wires, many of them having such current passing through them that the slightest touch meant death. They knew, as their own witnesses testify, that any wire upon those poles was liable to break and carry the deadly current to the ground by falling across a live wire, especially if the wire was a naked one, as this wire admittedly was. This dead, useless and uninsulated wire did break, fell across a charged wire, carried down the current, and the death of the plaintiff."

iff's husband was the result. We certainly cannot disturb the verdict because of the finding of the jury on the question of defendant's negligence. The only question which we are called upon to consider is that of the alleged contributory negligence of the man who was killed. He knew that the wire was conducting a dangerous current of electricity. If he had no duty imposed upon him with respect to it, he had sufficient notice to make it negligence for him to interfere with it. He was, however, a policeman on duty at the time, and upon the street on which the wire fell. It hung from a pole, the end resting on the ground near the foot crossing, and at intervals emitting sparks. It was a rainy night, and any contact with the wire meant injury. Even the touch of the frame of an umbrella of one passing to the wire would doubtless have caused the instant death of him who carried it. Will the law say to the policeman on duty under such circumstances that his sole or primary duty is to look out for his own safety? If it will not, then this question was one for the jury. It was told that, if he voluntarily took the wire in his hand, there could be no recovery. The testimony showed that he undertook to remove it with his mace—a method which, under ordinary circumstances, would have been perfectly safe. In some unexplained way, he came into more dangerous contact with the wire. Test the case by changing the position of the parties. Suppose, in pushing aside this wire with his mace, Dillon had brought it in contact with, and thus injured, some one who was passing by, and had been sued, would any court have the hardihood to say, under the circumstances, as matter of law, that he was guilty of negligence? Doubtless, by standing on the sewer drop, especially on this wet night, he increased his danger. But a negligent company cannot, for the purpose of escaping liability for its acts, set up a duty on the part of policemen to be expert electricians; and we must, in discussing this question, assume

the negligence of defendant company. Look at the matter as we will, we must either say to all policemen that in such cases they must put their own safety before that of the citizens whom it is their business to protect, or submit the question of negligence as one of fact to be determined by the jury. If there was error committed in the charge in this case, it was in favor of defendant. We are by no means certain that the maintaining on a street like this of naked wires, which might be insulated, is not negligence or at least evidence of negligence. Even if a wire has no current of its own, it will, when broken, if uninsulated, much more readily lead off a dangerous current from another wire. Where the necessary dangers are so great, the unnecessary ones should all be eliminated. The motion for a new trial must be refused."

George C. Wilson and William D. Evans, for appellant.

Marron & McGirr, for appellee.

PER CURIAM: The only subjects of complaint in this case are the learned trial judge's refusals to affirm defendant company's three points for charge, in each of which he was substantially requested to direct a verdict in its favor. There appears to be no exception to his general charge, nor to any of his rulings on questions of evidence, etc. It is very evident from an examination of the testimony that it presented material questions of fact, which the jury alone could legally determine. The case was accordingly submitted to them in a clear and accurate charge—quite as favorable to the defendant as it could reasonably ask. The action of the learned judge in refusing to take the case from the jury, and in submitting to them both controlling questions of fact—defendant company's negligence, and the alleged contributory negligence of the deceased—is so fully vindicated in what he says in his opinion overruling the

motion for a new trial that it is wholly unnecessary to refer in detail to the testimony that required the court to submit the case to the jury, and authorized them to find as they did. In view of the instructions under which the jury acted, their verdict necessarily implies a finding that defendant company was guilty of negligence in leaving the broken, uninsulated telephone wire in such a position as to endanger the lives of persons using the street, and that plaintiff's husband, in the proper discharge of his duty as a police officer, while attempting to remove the dangerous nuisance, was brought in contact with the charged wire, and thus without any negligence on his part, lost his life. The verdict was clearly warranted by the evidence. Judgment affirmed.

NOTE.—See note to *East Tenn. Teleph. Co. v. Simms' Adm'r*, post.

JOHN S. MITCHELL V. CHARLESTON LIGHT & POWER COMPANY.

South Carolina Supreme Court, September 17, 1895.

INJURY BY ELECTRIC SHOCK.—INSTRUCTIONS TO JURY.

In an action for damages due to electric shock caused by contact with a wire which had broken and the severed ends were hanging near the street, various instructions to the jury were held not to constitute reversible error; in view of the rule that the charge must be considered as a whole, and that all the ambiguities, defects and errors in the instructions complained of were cured by other instructions and by the general tenor of the charge.

APPEAL by defendant below from judgment of Charleston County Circuit Court of Common Pleas.

All the questions arose over alleged errors in instructions to the jury. The instructions complained of and

others bearing upon the questions at issue are sufficiently stated in the opinion.

Ficken & Hughes, for appellant.

Buist & Buist, for respondent.

GARY, J.: The appellant is a corporation engaged in generating and furnishing electricity in the city of Charleston, S. C., for the purpose of illumination and motive power. On the 16th of December, 1893, during the prevalence of a violent windstorm, one of the electric wires of the defendant, fully charged with electricity, broke, and the two severed ends rested on the ground in one of the thoroughfares of the city. The defendant's testimony tended to show that the wire broke about 2 o'clock, while the testimony of the plaintiff tended to show that it broke at an earlier hour in the day, and that between 12 and 1 o'clock on the day of the accident, the defendant was notified that there was some trouble with its wires, and that they were dangerous. At about 3 o'clock P. M. the plaintiff, while passing through this thoroughfare, was injured by the fallen wire. He was instantly shocked, upon coming in contact with it, and fell to the earth unconscious. For some time thereafter he was confined to his bed, during which period he suffered greatly. His hand was badly burned, and he lost the use of two fingers. This action was instituted to recover damages for such injuries. The plaintiff charged negligence on the part of the defendant, in that it permitted its wires charged with electricity to hang suspended over a thoroughfare of the city, so as to become dangerous to passers on the street, and that the plaintiff, a passenger, in consequence thereof, was seriously injured by the said wire charged with electricity, and was damaged to the extent of \$20,000. The defendant joined issue on these allegations, and set up the defense of

contributory negligence on the part of the plaintiff; also, set up the further defense that the injury resulted from the act of God. The jury found a verdict in favor of the plaintiff for \$10,000. The defendant moved for a new trial before his honor, Judge GARY, who granted an order for a new trial, unless the plaintiff would remit \$2,500 of the verdict, which the plaintiff did. The charge of the presiding judge will be set out in the report of the case.

The appellant's first exception is as follows: "(1) That the presiding judge erred in charging the jury as follows: 'If a cyclone that could not be anticipated or reasonably foreseen was the cause of that wire falling, and the company was 'not negligent in allowing it to remain there for an unreasonable length of time, then under those circumstances, it would not be liable.' " It is not contended that the detached portion of the charge, in itself, states an erroneous principle of law, but that it is misleading, inasmuch as the jury might have inferred that if a cyclone which might have been anticipated, or reasonably foreseen, was the cause of the wire falling, and the company was not negligent in allowing it to remain there for an unreasonable length of time, still, under those circumstances, it would be liable. The appellant also contended "that the presiding judge, in confining his declaration to the effect of the class of storms commonly designated as 'cyclone,' rejected the proposition that any other class of storm, or that a storm of not quite the same degree of violence as a cyclone, would operate to relieve the defendant from liability, were it in other respects free from negligence." Under the numerous decisions of this court the principle is well established that the charge of the circuit judge to the jury must be considered as a whole. When an exception is taken to a certain portion of the presiding judge's charge to the jury, it is the duty of this court, in considering this exception, to look to the entire charge, to ascertain whether or not the detached portion of the charge

correctly states the views of the law which the presiding judge intended to convey to the jury. In his charge to the jury touching this question, his honor said: "The question for you is, were these wires erected so as to anticipate any ordinary occurrence in the weather? Was it the act of God, or was it the careless or loose manner in which the wires were erected, which caused this wire to break? If it were the act of God—that is, such an act as a business man of ordinary forethought and prudence could not anticipate—then the company would not be liable under those circumstances. But, on the other hand, the company is charged with so placing their wires, and so keeping them in repair, as to withstand the ordinary weather—rain, heat, cold and wind. It is alleged on the part of the company that the wire was broken in consequence of a severe storm. Was it an ordinary windy day, such as is liable to occur at that time of the year, or was it one that could not be anticipated? The law does not require impossibilities. If a cyclone that could not be anticipated, or reasonably foreseen, was the cause of that wire falling, and the company was not negligent in allowing it to remain there for an unreasonable time, then, under those circumstances, it would not be liable. But if the accident was one due to the wires being improperly erected, or improperly maintained in repair, or, having been properly erected, were broken, and allowed to remain on the streets an unusually long time, then, if the injury to the plaintiff occurred under those circumstances, the company would be liable to compensate him in damages. These are the general observations that I desire to call to your attention before passing upon the points of law I have been requested to charge you." When that portion of the charge set out in the exception is considered in connection with the entire charge on the question, we see no ground for sustaining the objection to it that it might have misled the jury. We come next to a consideration of appellant's second objec-

tion to the language of the presiding judge contained in the first exception. The presiding judge used the word "cyclone," in his charge to the jury, because the witnesses had testified that the day when the injury was sustained was cyclonic. The charge was therefore based upon the testimony and applicable to this case. When the charge was considered in its entirety, we do not see how it can be construed as announcing the proposition of law that, if the defendant was free from negligence, it would still be liable, if the falling of the wire was caused by a class of storm other than a cyclone, or by a storm of not quite the same degree of violence as a cyclone. The first exception is overruled. The second exception is as follows: "(2) That the presiding judge erred in refusing to charge the defendant's second request to charge, viz., that 'if the jury find that the wire in question was broken by a storm, or from some cause beyond the control of the defendant, then no blame can attach to the defendant from the fact that the wire fell, and remained lying on the ground in the public thoroughfare, unless it was allowed to remain there after notice, for an unreasonable length of time; that is, for a period of time longer than would furnish a reasonable opportunity for the removal of the wire.' " The words "after notice" rendered the proposition of law therein stated unsound, for the reason that the negligence of the defendant might have consisted in its failure to know the facts connected with the breaking of the wire. In other words, the defendant might have been negligently ignorant. *District of Columbia v. Woodbury*, 136 U. S. 463; *Branch v. Port Royal, etc. Railway Co.*, 35 S. C. 405. It was not the duty of the circuit judge to strike out that part of the request to charge which rendered it defective, and then charge so much thereof as embodied a sound proposition of law. *Gunter v. Manufacturing Co.*, 15 S. C. 443, and numerous other cases in this State. The second exception is overruled.

The third exception is as follows: "(3) That the presiding judge erred in refusing to charge, and in striking out from the defendant's third request to charge, the words 'being informed of,' where they occur in said request, immediately following the words 'a reasonable time after.' " The third request to charge is as follows: "That the defendant was entitled to a reasonable time after [being informed of] the fall of the wire, in which to repair it, or to remove it out of the way of persons using the streets; and, if the jury find that the injury to the plaintiff occurred before the expiration of such reasonable time, then the plaintiff is not entitled to recover anything in this action." This exception cannot be sustained. The jury might have found that the injury to the plaintiff occurred before the expiration of a reasonable time after the defendant was informed of the fall of the wire; yet this would not necessarily have precluded the plaintiff from recovering damages, because the negligence of the defendant might have consisted in failing to take proper steps to receive information concerning the condition of its wires. Under this request to charge, if the defendant was not informed of the fall of the wire until a week or a month thereafter, it would still have been entitled to a reasonable time to remove the obstruction, after such notice, although it might have been negligently ignorant. The defendant was bound to exercise due diligence to receive information as to the condition of its wires, and its failure to use proper diligence in this respect would constitute negligence. The third exception is overruled.

The fourth exception is as follows: "(4) That the presiding judge erred in refusing to charge the defendant's fifth request to charge, viz., that 'if the jury find that the plaintiff was injured by coming in contact with defendant's wire, and that by the exercise of ordinary care he could have avoided such contact, then the plaintiff is not entitled to recover anything in this action.' " It would

have been error on the part of the circuit judge to refuse this request, were it not for the fact that he, in substance, charged the proposition of law therein contained in another part of his charge to the jury, to wit, in charging the defendant's sixth request to charge, which is as follows: "If the jury find that a want of ordinary care on the part of the plaintiff in any degree contributed to the injury, then the plaintiff cannot recover in this action." Whether or not the plaintiff had knowledge that the wire was filled with electricity, was a fact to be considered by the jury in determining the question of negligence on the part of the plaintiff in coming in contact with the wire, but the failure to make mention of the electricity in the request to charge did not render the propositions of law therein stated unsound. For the reason that this request was substantially presented to the jury, the fourth exception is overruled.

The fifth exception is as follows: "That the presiding judge erred in commenting upon the plaintiff's seventh request to charge, and explaining the same as follows: 'If a man is in danger, and in order to avoid that danger, *bona fide*, does something which is dangerous, that would not be considered, in law, contributory negligence.'," These words are to be construed in connection with the seventh request to charge, which is as follows: "When one is placed by the negligence of another in a situation of terror, his attempt to escape danger, even by doing an act which is in itself dangerous, and from which injury results, is not contributory negligence, such as will prevent him from recovering." It will be observed that the exception does not question the correctness of the law as charged in the seventh request, but only complains of error on the part of the presiding judge in using the foregoing words after charging said request. When the words used by the circuit judge are considered in connection with the seventh request, it will be seen that they do not lay down a different proposition of law from that contained in said request, and that

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they are simply explanatory of said request. Even if considered alone, these words do not state an erroneous principle of law, although, in themselves, they are not as comprehensive as might have been desired. It is the judgment of this court that the judgment of the Circuit Court be affirmed.

NOTE.—See note to *East Tenn. Teleph. Co. v. Simms' Adm'r*, post.

DENNIS J. GRIFFIN v. UNITED ELECTRIC LIGHT COMPANY.

Massachusetts Supreme Judicial Court, October 19, 1895.

(164 Mass. 492.)

INJURY FROM SHOCK.—NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE.

A company maintaining electric wires owes to every person who, for purposes of business, is rightfully upon the premises where they are maintained, the duty to use reasonable diligence to see that its wires are kept in repair and properly insulated.

In an action for damages for injuries by electric shock, questions of negligence and contributory negligence held properly submitted to the jury. *Illingsworth v. Boston Elec. Lt. Co.*, 5 Am. Electl. Cas. 812, cited; *Hector v. Boston Elec. Lt. Co.*, 5 Am. Electl. Cas. 800, distinguished.

APPEAL by plaintiff from judgment of Superior Court, Hampden county, upon verdict directed for defendant. Facts stated in opinion.

J. B. Carroll for the plaintiff.

Wm. H. Brooks (*W. Hamilton with him*), for the defendant.

LATHROP, J.: This is an action of tort, for personal injuries sustained by the plaintiff by receiving an electrical shock from a wire of the defendant company. The plaintiff

tiff was a tinsmith, and was at work, with a fellow servant, placing a galvanized iron conductor on the rear of a building called the American House. He was upon the ground, and his fellow servant was on a ladder near the roof of the building, which was about twenty-two feet from the ground. The wire from which the plaintiff received the shock ran along the wall of another building until it reached a point about two feet from a corner formed by this building with the American House, and then ran diagonally across the corner to the wall of the American House, at a point eight or ten feet from the same corner, where it entered a square iron block attached to the wall of the American House. This wire was about twelve feet from the ground. Six or eight inches higher than this wire and about eight inches nearer to the building, another wire ran along, and went into the same box. The conductor was to be placed in the corner formed by the two buildings, for the purpose of carrying off water from a gutter under the eaves of the American House.

We are of opinion that there was evidence for the jury that the plaintiff was in the exercise of due care. The jury might well have found, on the evidence, that the injury was caused by the pipe's coming in contact with a place on the wire where the insulating material had become worn off. It cannot be said, as matter of law, that this condition was so apparent to the plaintiff that he must have seen it, or ought to have seen it, although the accident happened in the forenoon. While an expert may consider it dangerous to touch any wire unless he knows it to be a harmless one, there was evidence that the plaintiff was not an expert, and did not know that an electric light wire would do any hurt, or that electric light wires ran on the sides of buildings. The question of his due care was for the jury. *Illingsworth v. Electric Light Co.*, 161 Mass. 583, 588.

We are of opinion, also, that there was evidence of the

defendant's negligence, proper to be considered by the jury. There was certainly evidence that the insulation of the wire was gone, and its condition was such that the jury might have found, from the description given of it by the witnesses, that it had been in that condition for such a length of time that the defendant ought to have known of it. The plaintiff was not a trespasser, or a mere licensee, who must take the premises of another as he finds them. He was rightfully on the premises, for purposes of business. On these premises the defendant had rightly placed, as the case finds, two electric wires. These were a source of danger, unless properly insulated. This fact was recognized by the defendant, by insulating them. But it was negligent if it failed to use reasonable diligence in seeing that its wires were kept in a state of repair. This duty it owed at least to every person who, for purposes of business, was rightfully upon the premises. What its duty was, in this respect, as to other persons, we have no occasion to inquire. See *Illingsworth v. Boston Electric Light Co.*, *ubi supra*.

The ruling of the justice of the Superior Court in favor of the defendant is stated in the report, upon which the case comes before us, to be based upon the case of *Hector v. Boston Electric Light Co.*, 161 Mass. 558. But that case differs essentially from the one before us. There a lineman of a telegraph and telephone company was sent to attach a wire to a standard owned by the defendant on the roof of a building numbered 45 Temple Place, in Boston. Instead of entering this building, and going out upon the roof, he went up through the building numbered 29 Temple Place, and passed over the roofs of several intervening buildings until he came to the roof of No. 41, which was next to, but higher than, the roof of No. 45. A bunch of wires ran from the standard on No. 45 over a small portion of the roof of No. 41. The plaintiff

iff stooped under these wires to see how he could get on to the roof of No. 45, and was injured by reason of the insulation being worn off from one of these wires. The case was decided in favor of the defendant upon the ground that the defendant owed no duty to the plaintiff to maintain an effectual insulation of its wires over other buildings than that on which its standard was placed, which was the only place to which the telegraph and telephone company sent the plaintiff or where he had a right to be. In the case at bar the plaintiff was rightfully where he was when injured. The question of the defendant's negligence was for the jury.

By the terms of the report, the order must be, *case to stand for trial*.

NOTE.—See note to *East Tenn. Teleph. Co. v. Simms' Adm'r*, post.

S. T. McLAUGHLIN v. LOUISVILLE ELECTRIC LIGHT COMPANY.

Kentucky Court of Appeals, November 25, 1896.

INJURY BY ELECTRIC SHOCK.

It is the duty of an electric light company to perfectly insulate its wires at points where persons are apt to come in contact with them, and to use the utmost care to keep them insulated.

Proof of injury to a person by contact with an electric light wire, the insulation of which at a joint had become defective, by reason of the loosening of the wrapping, is conclusive proof of the negligence of the company maintaining the wire in failing to keep it insulated, it being so located that persons were liable to come in contact with it.

Cases of this series cited in opinion, appearing in bold faced type: *Clements v. Louisiana Elec. Lt. Co.*, vol. 4, p. 381; *Haynes v. Raleigh Gas Co.*, vol. 5, p. 234.

APPEAL by plaintiff from judgment of Circuit Court, Jefferson county.

Junius C. Klein, for appellant.

Gibson & Marshall, O'Neal, Phelps & Pryor, and Phelps & Thum, for appellee.

GUFFY, J.: It is alleged in the petition in this action that "the plaintiff is and was on the 8th day of July, 1893, a painter by trade, and followed the same for a livelihood, and was on the 8th day of July, 1893, engaged in painting a house on the east side of Fourth street, in the said city of Louisville, between Market and Main streets, and numbered —; that on said 8th day of July, 1893, and long prior thereto, the defendant, its agents and servants, had erected and maintained one of its electric wires, charged with electricity, on the side of said house facing Fourth street; that the said wire on the 8th day of July, and long prior thereto, was insufficiently, carelessly and negligently insulated, and that defendant, its agents and servants, were well aware of said want of insulation, or could have been aware of same by the exercise of proper diligence; that plaintiff on said 8th day of July, 1893, while in the discharge of his duties as painter aforesaid, and without fault on his part, came in contact with said wire, which at the said time was heavily charged with electricity by the defendant, its agents and servants, whereby he was severely shocked and rendered insensible, and that he remained insensible and unconscious for 20 minutes and more; that he suffered severe pain, both physically and mentally, by reason of said shock, and that the flesh of his left hand was burnt and blistered to such an extent as to render the said hand useless, and that ever since and now said plaintiff is unable to use said hand in the performance of his vocation as a painter; that the plaintiff is rendered less able thereby to make a living at his trade as a painter; that the said injuries received by the said plaintiff are permanent, and that his entire nervous system, by reason of said shock, is unbalanced, causing

plaintiff much and severe pain; that the said injuries complained of herein were caused wholly by the gross negligence of the defendant, its agents and servants; that the plaintiff has been damaged by reason of said injuries in the sum of \$2,500. Wherefore, the plaintiff prays judgment against the defendant for the sum of \$2,500, and for his costs, and for all proper relief." The defendant filed a demurrer to the petition, which was overruled by the court. The first paragraph of the answer substantially denies all the averments in the petition which show any right to recover. The second paragraph of the answer is as follows: "Further answering, this defendant says that the injuries received by the plaintiff, and set forth in the petition, were received wholly and entirely because of his want of proper care and caution in looking out for his own safety and by reason of his carelessness in coming in contact with an electric light wire, which he knew, or by the exercise of ordinary care for his own safety could have known, was then and there charged with a current of electricity, making it dangerous to life for any one to come in contact with the said wire. Defendant says that, by the exercise of ordinary care for his own safety, and such as circumstances and surroundings made it apparent was necessary, the plaintiff could have avoided coming in contact with the said wire, and could have escaped all injury therefrom. Defendant says that plaintiff came into contact with said wire by failing to exercise that degree of care which he knew or ought to have known under the circumstances was necessary to be exercised by him to avoid injury from said wire. Wherefore, having answered, defendant prays to be dismissed. The reply of plaintiff traversed the allegations of the answer. The jury found for the defendant, and his petition was dismissed. Appellant relied on these grounds for a new trial, viz.: That the court erred in refusing to instruct the jury as requested by plaintiff in

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instructions Nos. 1, 2, 3, 8 and 9; (2) that the verdict of the jury is not sustained by sufficient evidence; (3) that the court erred in not excusing a juror, William Pryatt, for cause, he being a stockholder in the Louisville Gas Company, and it being the owner of stock in the defendant company. The motion for a new trial was overruled, and plaintiff has appealed.

The plaintiff below (appellant here) testified in substance as follows: "S. T. McLaughlin testified: That he was twenty-two years of age, and a house painter by trade; was a contractor in that line, and had a job in conjunction with Asa Carr of painting the front of H. C. Green's hotel, know as the 'Fourth Avenue Hotel,' and had almost finished the work, on the 8th day of July, 1893, when he came in contact with one of the defendant's electric wires, near the side of a window, and received a shock. That defendant had two wires running from the west side of Fourth street, in Louisville, Ky. That these two wires were fastened to brackets attached to the side of the wall between the first and second windows of the hotel, counting from the north. These windows were on the second floor of the building. The first floor was occupied by business firms. That these brackets were fastened to the wall about six inches from each window, and about five feet above the sill of the windows. That defendant has an iron box, called a 'converter,' attached to the side of the hotel building, midway between these two windows. That this box was about a foot above an iron cornice running the full length of the building, immediately below the windows, about six inches below. That these two wires ran from the brackets to the top of this converter or box. That plaintiff was shocked by the wire next to the north side of the second window, at a place where the wire was joined together and about halfway between the bracket and the converter. That this wire ran down from its bracket along the side of the window, and six inches from the window, for about

two feet, and then turned over north to the converter. That the iron cornice was about twelve inches wide; space enough for a man to stand on conveniently and paint. That he and his men had to use the cornice to work from, as there were wires preventing the staging or swinging ladder from being let down between them. When he had painted down to the bracket and wires, he pulled the staging up out of the way, and painted around the wires and the iron box while standing on the iron cornice. The window sill was outside about 5 inches by — inches, and rested on the iron cornice inside of wood about a foot wide. That he had put several coats of paint on the house, and was through, with the exception of touching up the right hind ear of the iron box. That he was in the act of getting out of this second window on the cornice, to touch up the ear, when he received the shock. That he had taken his brush full of paint in his right hand, and nothing in his left, and was on the sill of the window, turning back out onto the cornice, when he used his left hand to steady himself against the north side of the window opening, when his hand came in contact with the wire, and he received the shock which rendered him unconscious, and he did not know anything more for about half an hour, when he was revived, and found himself inside of the house, with Asa Carr, W. J. Cody, his employe, and Mr. H. C. Green, working with him to revive him. That his left hand was burnt and blistered on the 3rd and 4th fingers, and at the edge of the palm, at the base of small finger. That he suffered a great deal at the time of the shock and long afterwards. That he went home, and went to bed for a week. That he has never fully recovered the full use of his left arm and hand. That he has not been able to work at his trade or calling on account of the weakness of his hand. That he cannot properly handle the brush and ropes. That in his trade it requires strong hands and arms to hoist and lower himself on the staging. That

he has not had any work at his trade at all. That he did and is working as a hand on the steamer ———, plying between Louisville and Cincinnati; has worked about two months. That there was no sign or anything else to warn him of a danger about or near those wires." On cross-examination, said S. T. McLaughlin testified: That no one warned him at any time about those wires. That he did not know Squire Green, but did know Mr. Green, proprietor of the hotel. That Squire Green did not tell him to keep away from those wires. Did not see Squire Green around the building the day before the accident. Squire Green did not offer to cut the wires if he wanted it done. Nor did he tell Squire Green he could get along without the wires being cut. That no one told him that the wires were alive or dangerous. That he knew that electric wires were dangerous, but that he had been working around the wires all week, and all seemed to be insulated, and yet he was not hurt. That he did not know electricity was turned on. That it was about noon of the 8th day of July, 1893, when he was hurt. That he saw no lights about the building. That he came up to the office of the defendant one Sunday night; whether first Sunday after the accident or not he did not remember. Was there because Mr. Smith had sent for him. Did not tell Mr. Smith or any one else that he was not hurt or was scared more than hurt, and did tell him then and there that he was hurt, and showed him his hand, and pointed out the places where it was burned. That he did not meet Squire Green every other Sunday on Third and Jefferson streets. Witness then showed his hand to the jury, pointing out the only indication of the burn at edge of palm. That what appeared to be a wart there was not a wart. It was not there when he was shocked. It came there afterwards, when it healed up.

William J. Cody testified: "Was working there on the 8th day of July, 1893, the day on which Sam McLaughlin

was hurt. That he was standing on the first window, inside of same, stirring some paint. The work of painting the building was finished with the exception of a little space below the second window sill, and one of the ears of the iron box on the side of the house between the first and second windows. That McLaughlin got his brush full of paint, and was going out to paint this ear; and, while I was at the first window, he started to get out of the second window, with his brush in his right hand. Had nothing in his left. He had hardly gotten into the window opening when I heard a groan, followed immediately by a second one, and I then leaned out of the window, and looked in the direction of the groans, and saw McLaughlin have hold of the electric wire between this iron box and a oracket right on the joint of the wire. I quickly ran to the second window, put my arm between him and the north side of the window out around his body, and took hold of the wrist of his left hand, and jerked it loose from the wire, and lifted him into the building, and laid him down on the floor. About that time Asa Carr came into the room, and then Mr. Green, of the hotel. We all rubbed him, walked him and slapped him for fully twenty minutes before he was revived. At the time I pulled his hand loose from the wire, I received a shock myself, but not enough to hurt me. McLaughlin, when I reached him, was doubled up partly on the window sill, and one leg out on the iron cornice below the window. He suffered a great deal; was unconscious for fully twenty minutes. Examined the joint he had hold of immediately after we had got him to himself. Found the joint very loose and rotten. One end of the stuff used in wrapping it was hanging down about two inches. The wires all seemed to be covered with insulation. The place McLaughlin had hold of this wire was very near the north edge of the north side of the second window. The bracket to which it was fastened was within six inches of the edge

of the window. These windows were about three feet apart. The sills were of wood and stone. The stone was five inches wide and thick, and rested on an iron cornice, running above the storerooms on the first floor. This iron box or converter was placed against the wall between the first and second windows in the middle, and a foot above the iron cornice. This wire entered at the top of the box at the side. The wires come from across the street, from the west side, and run over to these brackets, and then down to the box. Whenever we had painted to the top down to these wires, we pulled the staging up out of the way, and stood on this iron cornice, and painted from there. The cornice is twelve inches wide. Had worked around the very same wire several times. Had experienced no shock, nor did he notice anything wrong with the wire. All seemed insulated. Did not remember seeing Squire Green around there. Did not hear him or any one else warn McLaughlin to beware of the wires. Nothing was said about the wires being dangerous." Other witnesses testified as to the injury.

John F. Bunscomb testified as follows: "John M. Bunscomb testified that he is an electrician. Have run similar plants to that of defendant. Knows the defendant's plant well, and its power. Formerly an employe, when the defendant was on Third street, several years ago. Electric wires are always insulated; that is, covered with a material that is a non-conductor. This is done to prevent a waste of power, and for safety. There are different grades of insulation. The insulation is put on at the factory. Whenever it is desired to join two ends of different wires, the ends are scraped of all insulation. The clean ends are then twisted around each other closely, in order to make close connection. After, the joint is then soldered together. This makes a perfect connection. Then, to protect this joint, it is wrapped usually with a rubber tape about an inch wide, putting on five layers, which is con-

sidered by the underwriters as a sufficient insulation. This rubber tape adheres to itself, and if pressed and wrapped on tightly, it will not come off easily. This is the method of wrapping joints in high tension wires, which is the character of defendant's electric wires. These joints, as well as the regular insulation on the wires, is apt to rot and wear off. The action of weather has something to do with this. The rubber will rot in time, and, in case a layer or two is thus rotten, it will more easily catch moisture, which renders the joints dangerous. All wires are more or less dangerous when wet, as in rainy weather; and if, in such case a good ground was had, I would not risk any of them. Iron cornice as usually used above store buildings forms an excellent conductor, and standing on it and holding a wire charged with electricity of high tension, even though insulated and in dry weather, is risky; also, most certainly so, in bad weather. Stone is not as good conductor as iron in wet weather. Using it instead of iron, I would not risk it. There is absolutely no perfect insulation except at a great cost, which prevents it being used extensively. All insulation is affected by the changes in the weather. Rubber, for instance, gets wet, and then it is dried by the sun. This soon wears it out. If a joint has on it less than five layers of wrapping, it is just as much or more apt to be dangerous. The smallest pinhole is sufficient to let the electricity of these high tension wires escape in force enough to be fatal. If a joint is wrapped loosely, it will catch the rain and moisture, and rot sooner than if wrapped tightly and evenly. A joint with an end of the wrapping hanging down a couple of inches would be considered dangerous. The iron box referred to is a converter. It reduces the force of the current. The wires entering the converter are called the 'primary wires,' and those leaving the box the 'secondary wires,' which are not dangerous because they carry a light current; otherwise, if a heavy current, it would burn out

the lamps. The full power or volt of the plant is used on those arc lights we see on the streets, and only a small part is used for lights inside the stores and residences. Have seen men apparently receive two thousand volts of electricity without serious results. The amount taken, though, is mostly guess work. So many conditions enter into the estimation of the amount actually received. Some men seem to be able to stand more than others. Would not tempt even the best of insulation if I was standing on a good conductor, especially in wet weather."

At the conclusion of plaintiff's testimony, the defendant asked the court to instruct the jury to find for defendant, which motion was overruled by the court. The testimony of defendant conduced to show that the defendant had used reasonable care, and that plaintiff was not severely injured. It also contends that plaintiff was guilty of contributory negligence.

The following are the instructions offered by plaintiff, and refused by the court: "No. 1. The court instructs the jury that it is the duty of the defendant, the Louisville Electric Light Co., to so insulate or protect its wires as to make them free from danger to those who may be brought in contact with them; and if they shall believe from the evidence that the said company failed to so insulate or protect the wire with which S. T. McLaughlin came in contact, and that his injuries were caused by the reason of such failure, then the law is for the plaintiff, and they shall so find, unless they shall further believe from the evidence that the said S. T. McLaughlin, by his own negligence, contributed to cause his injuries, and that he would not have been injured but for his contributory negligence, if any there was. No. 2. If the jury shall believe from the evidence that S. T. McLaughlin came in contact with said wire while in the act of climbing out of said window, and that the said wire was not so insulated or protected as to be free from danger to him,

and that his injuries were caused thereby, they ought not to find him guilty of contributory negligence unless in so doing he failed to exercise that degree of care which ordinarily careful and prudent persons usually exercise under the same or similar circumstances. No. 3. That the injury to the plaintiff is conclusive proof of the defective insulation of the said wire and of negligence of the defendant." "No. 5. Contributory negligence means the failure to observe that degree of care which ordinarily careful and prudent persons usually observe under the same or similar circumstances to protect themselves from injury and by reason of such failure helped to cause or bring about the injury complained of." "No. 8. That if they believe from the evidence that the said wire had all the appearances of having been properly insulated at the time the plaintiff received his injuries, that this was then an invitation or inducement to plaintiff to risk the consequences of contact with same, in the performance of his work in painting the house to which said wire was attached. No. 9. That, if the jury believe from the evidence that the plaintiff was not cautioned especially as to the dangerous condition of said wire before the accident occurred, then they are not to find him guilty of contributory negligence." The instructions given are as follows: "No. 1. The court instructs the jury that it was the duty of the defendant, the Louisville Electric Light Company, to so insulate or protect its wires at places where they may be dangerous to human life, as to make them reasonably free from danger to persons who may come in contact with them; and if they shall believe from the evidence that the wire with which the plaintiff came in contact was not insulated or protected at the point where he caught it, and that he received the injuries of which he complained because thereof, then the law is for the plaintiff, and they shall so find, unless they shall further believe from the evidence that he contributed to cause his injury by his own negli-

gence, and that he would not have been injured but for his contributory negligence, if any there was. No. 2. But unless they shall believe from the evidence that the defendant's wire at that point mentioned in instruction No. 1 was not so insulated or protected as to make it reasonably free from danger, and that the plaintiff was injured thereby, the law is for the defendant, and they should so find. No. 3. Or if they shall believe from the evidence that the plaintiff was negligent, and thereby contributed to cause the injury of which he complained, and that he would not have been injured but for his contributory negligence, if any there was, then the law is for the defendant, and they should so find. No. 4. If the jury find for the plaintiff, they should award him such a sum in damages as they may believe from the evidence would fairly compensate him for the mental and physical sufferings endured by him by reason of his injuries, and for loss of time and capacity to earn money at his trade and occupation. If they shall find from the evidence that the injuries of S. T. McLaughlin were caused by the negligence of defendant, and shall further believe from the evidence that the negligence, if any there was, was gross, then they may, in their discretion, award him such a further or additional sum as punitive damages as they may deem right and proper, under the evidence and these instructions, not exceeding in all the sum claimed in the petition. Gross negligence means the absence of slight care. No. 5. Ordinary care means that degree of care which ordinarily careful and prudent persons usually observe under the same or similar circumstances. Negligence means the failure to observe ordinary care. No. 6. Contributory negligence means the failure to observe that degree of care which ordinarily careful and prudent persons usually observe under the same or similar circumstances to protect themselves from harm, and, by reason of such failure, helped or caused to bring about the

injury complained of." To the giving of instructions Nos. 1 and 2, the plaintiff excepted.

The demurrer to the petition was properly overruled, as was also the motion for instruction to the jury to find for the defendant. It also seems to us that William Pryott had a disqualifying interest in the action, and should have been excused for cause. But by far the most important question involved is the law applicable to the case. Electricity is a powerful and subtle force, and its nature and manner of use not well understood by the public, nor is its presence easily ascertained or determined. Its use for private gain is very extensive, and becoming more and more so. The daily avocation of many thousands, of necessity, brings them near to the subtle force, and it seems clear that the electric companies should be held to the use of the utmost care to avoid injuring those whose business or pleasure requires them to come near such a death dealing force. In the case of *Clements v. Louisiana Electric Light Co.*, 44 La. Ann. 695, *et seq.*, the court said: "The deceased, Clements, was lawfully on the gallery roof. He was engaged in a service that necessarily required him to run the risk of coming in contact with defendant's wires, either by stepping over them or going under them. It is probable that the latter mode was the most convenient, and there is no evidence that, in so doing, he incurred any greater risk. The wires were visible, and to all appearances were safe. The great force that was being carried over the wire gave no evidence of its existence. There was no means for a man of ordinary education to distinguish whether the wire was dead or alive. It had all the appearances of having been properly insulated. From this fact there was an invitation or inducement held out to Clements to risk the consequences of contact. He had a right to believe they were safe, and that the company had complied with its duties specified by law. He was required to look for patent, and not

latent, defects. Had he known of the defective insulation, and put himself in contact with the wire, he would have assumed the risk. The defect was hidden, and the insulation wrapping was deceptive. It is certain, had it been properly wrapped, Clements would not have been killed. His death is conclusive proof of the defect of the insulation and the negligence of defendants. He exercised reasonable care in going under the wire in the performance of his duty, as he had a right to believe, from external appearances, that the wire was safe. His action was such as not to tend to expose himself directly to the danger which resulted in the injury. In fact, there was no apparent danger. . . . It cannot be said that, when Clements went on the roof to repair it, he went into the presence of known danger, and assumed the hazards of the employment. The employment was not dangerous. The wires, if properly insulated, as above stated, would have been harmless. It was only a remote danger, which he had to risk, and this depending upon the fact whether or not the defendant company had done its duty as specified by law. The external appearances—the only indication of performed duty to which Clements' attention could be fixed—were guaranties that the defendant company had done its duty. These appearances assured him that, in the performance of his work in sweeping the roof, it was not dangerous for him to risk going over or under the wire. *Bomar v. La. N. & S. Railroad Co.*, 42 La. Ann. 983. Even in the presence of a known danger, to constitute contributory negligence, it must be shown that the plaintiff voluntarily and necessarily exposed himself to it, unless it is of that character that the plaintiff must assume the risk from the very nature of the danger to which he is exposed. From the appearance of the wire, its wrappings with insulated tape, and the known duty of the defendant to protect the insulation at this particular splice or joint, Clements had no reason to anticipate danger ex-

cept from the fault of the defendant company. This fault was the cause of his death, and his act in passing over or under the wires was too remote to give it the character of contributory negligence." The case of *Haynes v. Raleigh Gas Co.*, 114 N. C. 211, was an action to recover for death caused by a boy taking hold of a live broken wire that was in the street. We quote from the decision of the court as follows: "It is due to the citizens that electric companies that are permitted to use for their own purposes the streets of a city or town shall be required to exercise the utmost degree of care in the construction, inspection and repair of their wires and poles, to the end that travelers along the highway may not be injured by their appliances. The danger is great and care and watchfulness must be commensurate to it. Passengers on railroad trains have a right to expect and require the exercise by the carrier of the utmost care so far as human skill and foresight can go for the reason that neglect of duty in such case is likely to result in great bodily harm and sometimes death to those who are compelled to use that means of conveyance, 'as the result of the least negligence may be of so fatal a nature the duty of vigilance on the part of the carrier requires the exercise of that amount of care and skill in order to prevent accidents.' Ray, Neg. Imp. Duties, p. 53. All the reasons that support the rigid enforcement of this rigid rule against the carrier of passengers by steam apply with double force to those who are allowed to place above the streets of a city wires charged with deadly current of electricity, or liable to become so charged. The requirement does not carry with it too heavy a burden. Human skill can easily place wires and poles so that they will not fall or break, unless subjected to some strain that could not be anticipated; and it can as readily present the possibility under ordinary circumstances of the contact of wires that should not be allowed to touch one another." The evidence in this case

conduces to show that appellant was at work at his regular trade, and was where he had a right to be, and the joint of the wire, being apparently insulated, was to some extent, at least, a guaranty that there was no danger; but, independent of that fact, the situation of appellant, his work in hand, and the proximity of the wire, were such that he might without negligence have thoughtlessly taken hold of the wire, because he seemed to need support; and, besides, it was hardly to be expected that the current was on the wire at about noon, the wire being used wholly to supply incandescent lights or lamps. It seems clear to us that appellee should have been required to have had perfect protection on its wires at the point and place where appellant was injured. The fact that it was very expensive or inconvenient is no excuse for such failure. Very great care might be sufficient as to the wires at points remote from public passways, buildings or places where persons need not go for work or business; but the rule should be different as to points where people have the right to go for work, business or pleasure. At the latter points or places the insulation or protection should be made perfect and the utmost care used to keep it so. Instructions Nos. 1, 2, 3, 5 and 8, asked by appellant, should have been given. The others refused were not important, and tended to draw attention to particular facts or evidence. Such instructions are not favored in law. It results from the foregoing views that the court erred in giving instructions Nos. 1 and 2, marked as given. The other instructions given by the court were not excepted to; hence need not be discussed. For the errors indicated, the judgment below is reversed, and cause remanded, with directions to set aside the verdict and judgment, and for a new trial upon principles consistent with this opinion.

NOTE.—See note to *East Tenn. Teleph. Co. v. Simms' Adm'r*, *post*.

ATLANTA CONSOLIDATED STREET RAILWAY COMPANY V.
OWINGS.*Georgia Supreme Court, Jan. 20, 1896.*

(97 Ga. 663.)

INJURY BY ELECTRIC SHOCK.

(Head-note by the court) :

Where, in the prosecution of its business, a corporation employs a wire which, because of its being charged with a powerful and dangerous current of electricity, is liable, upon coming in contact with the wires of other corporations, to cause injury or death to employes of the latter while engaged in the performance of their duties, the corporation first referred to is, relatively to such employes, under the duty of observing at least ordinary diligence, not only in preventing such a contact, but also in discovering and preventing its continuance, even when occasioned by the negligence of others, including that of a corporation whose employes are thus exposed to danger.

The declaration alleging that the defendant's "feed wire," it being a wire charged with a high potential current of electricity, was, at the time of the killing of the plaintiff's husband, "negligently and carelessly permitted by the defendant to rest upon and be in immediate contact with" a call wire of a company which was the master of the deceased, and the charge, as a whole, making it sufficiently clear to the jury that the plaintiff must prove the negligence thus alleged, and also that it occasioned the death of her husband, before she would be entitled to a recovery, the defendant's request to charge that she could recover only upon some act or acts of negligence alleged in the declaration was fairly covered.

If, while upon a pole a considerable distance above the ground, a person is so burned, shocked, and put in pain by a current of electricity as to lose his strength or consciousness and the control of his movements, and, in consequence, falls to the ground, and dies, it may be safely asserted that his death was caused by the electric current, whether, in case there had been no fall from the pole, death would have ensued or not.

Cases of this series cited in opinion, appearing in bold faced type: *Augusta Ry. Co. v. Andrews*, vol. 4, p. 378; *Ahern v. Oregon Teleph. Co.*, vol. 4, p. 349.

APPEAL by defendant below from judgment of City Court of Atlanta.

N. J. & T. A. Hammond, for plaintiff in error.

Marshall J. Clarke, contra.

LUMPKIN, Justice:

1. This case, in some respects, resembles that of *Railway Co. v. Andrews*, 89 Ga. 653, although in one essential feature the two cases are materially different. In the former, it appeared that Andrews, who was injured by an electric current, was, at the time he received the shock, a trespasser upon the fire alarm system of the city of Augusta, having, without permission, climbed a pole upon which he had no right to go; and it was accordingly held that he took the risk incident to the trespass. In the present case the deceased husband of the plaintiff, who was killed by a current of electricity emanating from the plant of the defendant railway company, was not a trespasser, but was engaged in the performance of his duties as a lineman of the telephone company, and was in the strictest sense where he had a perfect right to be at the time he received the fatal shock.

The railway company employed, in the conduct of its business, a subtle, dangerous and death dealing agency. It consisted of a high potential electric current, which traversed wires stretched upon poles, and running through the city of Atlanta and its suburbs. These wires were liable, upon coming in contact with other wires belonging to the telephone company, the electric light company and perhaps other corporations, to cause injury or death to employes of these other companies while engaged in performing their duties as linemen. Under these circumstances, it is to all minds a clear proposition that the railway company was bound to exercise at least ordinary

diligence, not only to prevent contacts from which the above-mentioned consequences might reasonably be expected to ensue, but also to discover and take measures to prevent a continuance of such contacts even when occasioned by the negligence of any other persons. To hold otherwise would be to allow this company to maintain its deadly agency with no responsibility whatever for consequences which, in the natural course of things, might in all probability occur. Those who employ, in the prosecution of their business, a palpably and highly dangerous agency, such as electricity, are bound to exercise such precautions to prevent injury to others as the emergency would reasonably seem to require. In this connection, we refer to the interesting case of *Ahern v. Oregon Telephone, &c. Co.*, 22 L. R. A. 635. It cannot be doubted that the owner of a ferocious lion would be bound to keep him securely caged in order to prevent harm to others; and even if a negligent or malicious person should open the door of the lion's cage, and allow him to escape, there should be no unreasonable delay on the part of the owner in discovering this fact, and in taking diligent steps looking to the recapture of the animal. The feed wire of the railway company, from the very subtlety and intangible form of the danger that lurks therein when it is charged with a powerful current of electricity, is much more dangerous than a score of lions. Its death dealing power is not discoverable by exercising the senses of sight, hearing or smell. Imperceptibly and noiselessly it strikes down its victim, and he is either mutilated or killed before he has the slightest warning of the terrible danger so near at hand.

The duty of preventing, if possible, a contact between this dangerous feed wire and the wires belonging to other companies can hardly be denied. The duty of providing against its continuance, when occasioned solely by the

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act of others, is, of course, less stringent; but nevertheless, where such a contact exists, the company ought to discover it within a reasonable time, and take prompt and efficient measures to correct and remedy the evil. Exactly what period will constitute a reasonable time cannot be accurately defined. Each case must depend almost entirely upon its own peculiar facts and attending circumstances; and whether or not the proper degree of diligence has been observed will, in every instance, be a question for determination by the jury.

2. It is no longer a debatable question that, in order to recover for injuries occasioned by the negligence of the defendant, the plaintiff can recover only upon some act or acts of negligence alleged in his declaration. In the present case, counsel for the defendant requested that an instruction to this effect be given to the jury. The court declined to charge in the precise language of the request, but we think its substance was fully covered by the charge actually given. Among other things, the declaration alleged that the defendant's feed wire was "negligently and carelessly permitted by the defendant to rest upon and be in immediate contact with" a call wire of the telephone company. The charge, as a whole, made it sufficiently clear to the jury that the plaintiff must prove the negligence thus alleged and also that it occasioned the death of her husband, before she would be entitled to a recovery.

3. It was argued that the deceased was not actually killed by the electric shock; that while he was stunned and injured by it, his death was really occasioned by his fall to the ground from the top of the pole upon which he was at work. There is no merit at all in this contention. It was proved beyond question that the deceased was so burned, shocked and put in pain as to lose his strength or consciousness and the control of his movements, and, in consequence, fell to the ground, and was killed. Certainly, under such circumstances, it could not be inaccu-

rate to say that the electric current was the proximate cause of his death. . . .

NOTE.—See note to *East Tenn. Teleph. Co. v. Simms' Adm'r*, *post*.

NEWARK ELECTRIC LIGHT & POWER COMPANY V. GARDEN.

United States Circuit Court of Appeals, Third Circuit, November 30, 1896.

INJURY BY ELECTRIC SHOCK.—DUTY OF ONE ELECTRIC COMPANY TO EMPLOYEES OF ANOTHER.

Each of several electrical companies which by agreement occupy a common pole to support their wires owes the duty to take all reasonable precautions to prevent injury to the servants of any of the others, who may be sent there in pursuance of the common right; and this duty is not so circumscribed that it ceases to exist if a servant of one company happens to rest hand or foot upon a cross-arm belonging to another company, or to touch its wires.

The fact that a wire is insulated at all is evidence that the company maintaining it is aware that persons going upon the pole may come in contact with it, and of the danger of such contact. The fact that a wire appears to be insulated is calculated to inspire reliance upon its safety. The company is therefore chargeable with a high degree of care to see to it that the insulation is not defective.

Cases of this series cited in opinion, appearing in bold faced type: *W. U. Tel. Co. v. Thorn*, vol. 5, p. 283.

In error to the United States Circuit Court for the District of New Jersey.

John O. H. Pitney, for plaintiff in error.

Aaron V. Dawes, for defendant in error.

Before **ACHESON** and **DALLAS**, Circuit Judges, and **WALES**, District Judge.

DALLAS, Circuit Judge: This action was brought in the

Circuit Court for the district of New Jersey by the administrator of the estate of James A. Mason against the Newark Electric Light & Power Company, for causing, by its negligence, the death of Mason. There were a verdict and a judgment for the plaintiff, and thereupon the defendant sued out this writ of error. The usual defenses were set up in the court below. Negligence on the part of the defendant was denied, and contributory negligence on the part of the deceased was asserted; but upon these subjects, considered separately and apart from the fundamental question, to be presently dealt with, the majority of the court has experienced no difficulty.

There is no specific criterion of care which could have been applied in this case. Neither the defendant nor Mason disregarded any determinate provision of the law prescribing what the conduct of either of them should have been, for there is no such provision. The only rule which they, respectively, were bound to obey, is the general rule which enjoins the exercise of due care—the observance of such caution as, under the circumstances, an ordinarily prudent man would have observed. Whether either of them failed to perform this indistinctly defined obligation, assuming its existence on the part of the defendant, was a question of fact and of inference. The facts were controverted, the inference was disputed, and the evidence was not conclusive. Therefore, unless the case should have been entirely withdrawn from the jury, upon the underlying question about to be considered, no error was committed in submitting to it the issue as to negligence, both as respected the defendant and the plaintiff's intestate. The specifications, other than the third, which will be especially referred to, need not be further discussed. Although the charge of the court is, perhaps, open to some criticism, it exhibits no reversible error if not upon the one important and quite distinctive subject to which attention is now to be directed.

There is no liability for negligence where there is no duty of care. Consequently, a plaintiff who grounds his action upon an allegation of negligence by the defendant must show, not only that the conduct of which he complains was negligent in character, but also that it was violative of some duty which was owing to him. That the conduct of this defendant was not careful, and that its lack of care, and not any negligence of Mason himself, was the cause of the death of the latter, is established by the verdict; but as we have said, the whole subject of negligence was inconsequent if, under the law and the evidence, the defendant was under no obligation to regard Mason's safety. The primary, separate and controlling question upon this record, therefore, is: Was the defendant bound to exercise care—"ordinary care," as the court below held—to provide against the occurrence of such a calamity as befell Mason? That this inquiry may be intelligently answered, it is requisite that our investigation of the law should be based upon a correct conception of the facts to which it is to be applied; and those which are pertinent to this particular subject may be briefly stated.

The Western Union Telegraph Company was the owner of a certain telegraph pole, upon which the Pennsylvania Railroad Company rightfully maintained several electric wires, immediately supported upon three cross arms. The defendant company, also rightfully, maintained two wires, supported, one on either side of the same pole, upon a single cross arm. How this right, in either case, was acquired, is unimportant. There is no doubt that, in both, it existed, and that, in fact, the pole was lawfully used, not only by its owner, the telegraph company, and by a certain telephone company, but also by the railroad company and by the defendant. There were 12 cross arms in all, including the two temporary ones hereafter mentioned. The lowest was that which sustained the

wires of the defendant, and above, at a distance of several feet, was one of those upon which were the wires of the railroad company. In the space between these two bars were those in use by the telephone company, and below the latter, and above that of the defendant company, two new ones were inserted by the railroad company, to facilitate the transfer of its wires; and Mason was one of several men employed by that company, who, upon the occasion in question, were engaged in making that transfer, which consisted in removing its wires from the poles of the telegraph company (including the pole which has been specified) to certain other poles, which belonged to the railroad company itself. Mason ascended this pole, and placed himself finally—what he had previously done is immaterial—in the situation which he occupied when he met his death. His right foot was upon one side of the cross bar, on which there was an electric wire of the defendant. This foot, however, was not, and did not become, in contact with the wire. It rested at a point sufficiently removed from it to be free from danger. In point of fact, the accident did not result from the position of his right foot, for the fatal connection was made through his left foot, which was thrown over the next bar above, the lower of the two new bars, and was “dangling down towards the lower bar,” the one upon which was the defendant’s wire. While in the position described, a telephone wire was handed to Mason by a fellow workman, and in reaching out to grasp it, his pendent left leg was naturally, perhaps necessarily, extended towards the wire of the defendant, and, in consequence, his left foot either touched it, or came so near to it that, by reason of the thus electrically connected interposition of his body between that wire and the telephone wire, which he had seized in his left hand, he was subjected to the shock which killed him. The defendant’s wire was a large one, and was highly charged. It was insulated, but the insulation

was defective, and but for its exposed condition at one minute point this disaster would not have happened.

If, in view of the facts which have been narrated, it could be unqualifiedly asserted that, at the time and place of the accident, Mason was wrongfully upon the separate property of the defendant, and if nothing but that bare fact should be regarded, but one conclusion could be reached; for the law is well settled that, in general, the right to keep his own property in such condition as the owner may see fit is not restricted by any requirement to guard against its causing injury to one who, without invitation, actual or apparent, but as a bare volunteer or mere trespasser, intrudes upon it. This limitation of the principle that no person may lawfully use even that which is his own so as to do hurt to another is, however, not controlling in all cases; and the duty of care, which the law imposes upon those who undertake to operate so dangerous a force as electricity, may, under some circumstances, be due to one who, technically, is a trespasser. In such a case as this one, its special facts are for consideration, and upon them, and not solely with reference to the ownership or occupancy of the *locus in quo*, the question of duty must be determined. "It is true that, where no duty is owed, no liability arises. . . . But, as has often been said, duties arise out of circumstances. Hence, where the owner has reason to apprehend danger, owing to the peculiar situation of his property, and its openness to accident, the rule will vary." *Hydraulic Works Co. v. Orr*, 83 Pa. St. 332. It makes no difference, where the circumstances give rise to duty, that the plaintiff was "technically a trespasser." *Schilling v. Abernethy*, 112 Pa. St. 437. The true question is: Was he "a trespasser there, in a sense that would excuse the defendant for the acts of negligence, . . . whether the owner or occupant of premises is liable under any circumstances, and, if so, under what circumstances, for injuries received

by a person while on such premises, and by reason of their dangerous condition?"

In *Union Pacific Railway Co. v. McDonald*, 152 U. S. 262, the question was thus stated, and, in answering it, the Supreme Court held that, under the circumstances of that case, the person injured could not be regarded "as a mere trespasser, for whose safety and protection, while on the premises in question, against the unseen danger referred to, the railroad company was under no duty or obligation whatever to make provision." The fact that, in all these cases, the courts gave due weight to the circumstance that, in each of them, the person injured was a child, would not justify us in restricting the application of the principle upon which they were decided to cases which present the same peculiarity. The doctrine of all of them is that a duty of care may, by reason of the circumstances, be due from the owner of property to one who is technically a trespasser upon it; and the youth of those most likely to suffer from a failure to discharge such duty is simply one of the circumstances which, when present, is to be considered with the rest. The opinion of the court in the case last cited cannot be read without perceiving that the matter was so viewed by the Supreme Court of the United States; and the Supreme Court of Pennsylvania, by which the two cases first cited were decided, has repeatedly held that a child may be such a trespasser as to be subject to the consequence of his trespass. It has never laid down one rule with respect to children and another respecting adults, but has many times said that the former, like the latter, when trespassers "in every sense of the word," are to be regarded as wrongdoers, to whom the owner of the premises is under no obligation. *Rodgers v. Lees*, 140 Pa. St. 475; *Mitchell v. Phila. W. & B. R. Co.*, 132 Pa. St. 226.

It is only by liberally construing the assignment of errors that any of the specifications can be taken to raise the

particular question with which we are now dealing. But two of them can be said to present it, even by implication. These are:

“(2) That the plaintiff having rested his case, the defendant’s counsel moved for a nonsuit on the ground that no sufficient negligence on the part of the defendant had been shown to maintain the action, and also on the ground of contributory negligence, on the part of the plaintiff’s intestate, which motion was overruled. (3) That upon the completion of the evidence in the case, the counsel of the defendant renewed his motion for a nonsuit, and moved for a direction of a verdict for the defendant, upon the same grounds as stated in the former motion, which motion was overruled.”

The refusal to nonsuit is not reviewable (*W. U. Tel. Co. v. Thorn*, 12 C. C. A. 107); but the denial of the defendant’s request for binding instructions is; and, that the plaintiff in error may have the utmost advantage of his exception to that denial, we will consider this specification as if he had distinctly put his request that the case should be withdrawn from the jury upon the further ground that the evidence would not warrant a finding that there was such a duty of care resting upon the defendant as was requisite to the maintenance of the action. But still we do not think that the facts of this case would have warranted the learned judge in adopting such a course. The several occupants of this pole had, by virtue of the contract under which they jointly used it, a common interest that its use should not be environed with unnecessary danger. Each of them owed the duty to take all reasonable precautions for the prevention of injury to the servants of any of the others, who might be sent there in pursuance of the common right; and we cannot agree that this duty was so circumscribed that it ceased to exist if any of these servants happened to rest his hand upon a cross bar, or, as in this instance, to place his feet upon it. It is by no

means clear that the fact that Mason was partly upon the defendant's cross arm at all contributed to the result. On the contrary, it is certain that he might have stood wholly upon it, at the point at which his right foot was placed, without incurring any hazard whatever, for at that point there was no wire; and his left foot might have been accidentally extended to it if he had been entirely upon the lower of the two new cross arms, or even upon the pole itself.

Apart from this, however, he was not a mere trespasser upon the cross arm of the defendant. There was nothing in the surroundings to inform him that he ought not to go there, or that he would incur any risk if he did. The wire was insulated, and the defect in its insulation was not readily discernible. The cross arm, apparently, presented a safe footing, and, but for the defect in insulation, it was entirely safe to stand upon it. *Union Pacific Railway Co. v. McDonald, supra.* It may be conceded, as was decided by the Supreme Court of New Jersey, in *Telephone Co. v. Speicher* (not yet reported), that the defendant was not bound to make cross bars, intended for the purpose of supporting wires, of sufficient strength to support a man; but each case of this nature must be decided on its own facts, and in this one there is no question about the strength of the bar. It was quite strong enough to sustain the weight which Mason put upon it. There was no risk involved but that which the presence of the wire created, and that was, apparently, provided against by insulation. So far as appeared, therefore, the bar was not dangerous; and, in placing himself where and as he did, this man was doing his work, as one of the witnesses said, "the same as any man would do it that works at the business;" and common sense and humanity demanded, as we think, that while so working his life should not have been put in jeopardy, we do not say by a trap, for there was no purpose to ensnare, but by an

unknown and invisible peril, to which he might unconsciously or involuntarily be drawn, and from which, by taking ordinary care, the defendant might have protected him. The defendant cannot be heard to say that it did not anticipate that the linemen of the other companies, as well as its own, would do their work in the way that is usual with them. It was bound to know that they might come in contact with its wire; and that it did, in fact, assume the duty of providing against the occurrence of such casualties is shown by its having insulated the wire at all. The fact that it was insulated was calculated to induce reliance upon its safety, and plainly tended to allure or entice such a man as Mason to go upon the bar on which it was stretched. It offered an obvious, and, seemingly, a protected standing place. "There was nothing to warn either child or adult that it was not to be so used." *Schilling v. Abernethy, supra*. It was, therefore, "liable to the incursions of . . . even grown men," not "from thoughtlessness, accident, or curiosity," merely, as suggested in *Hydraulic Co. v. Orr, supra*, but in the prosecution of their legitimate calling.

Finally, and upon all the facts, we are of the opinion that, even upon the assumption that the plaintiff's decedent was technically a trespasser, the defendant, under the circumstances, owed him a duty of at least ordinary care. We are not attempting to lay down a rule applicable to all cases; but the principle which, in our judgment, is controlling in the present one, is that any person who engages in a highly dangerous occupation is bound to take such precaution in its pursuit as a sensible man would ordinarily take to avoid doing fatal or other serious injury to one who comes upon his premises, not as a mere trespasser or positive wrongdoer, but for a purpose in itself lawful, and which the owner had reason to believe might bring him there. The judgment is affirmed.

ACHESON, circuit judge, wrote a dissenting opinion.

NOTE BY THE COURT.—This statement of the situation of Mason is taken, substantially, from the charge of the court below, in which it was said: "While so employed, suddenly, and without warning, he gave a groan. His body was convulsively twitched, then rigidly straightened out. His right foot was upon the lower cross bar on which were the electric wires. His left foot was thrown over the next bar above, and was dangling down towards the lower bar. His right arm was around the pin on the third cross bar, and in his left hand he had grasped a wire, known as a "telephone wire," which had been handed to him by a fellow workman."

There is, it is true, some evidence which, standing alone, would seem to be to the effect that Mason was, though astride of the next bar above, wholly resting upon the bar used by the defendants; but, taken as a whole, we think it shows that one of his feet was, and must have been, "dangling," as described by the learned judge, at the time when he received the shock. He was in the act of reaching out, and naturally, we think, must have had one of his legs extended in a direction opposite to that in which he was reaching. To quote the language of several of the witnesses: "He stood in this shape, one arm between his legs, and he was reaching out to the extreme end of the arm. Q. No. 2 arm? A. No. 3. Q. He had his leg over No. 2, his foot on No. 1, and he reached over to No. 3 to make a fastening at that point? A. Yes, sir. . . . He was standing on the arm this way [illustrating], and another arm between his legs, and reaching out to fasten it to the end of the arm. . . . He had to reach out on account of this bottom arm was a six foot arm, and the other arm a ten foot arm, and he had to reach out about a foot. . . . His left foot was behind his right foot, and sometimes would be on the bar and sometimes would not." It is obvious that this testimony could be exactly comprehended only by one in whose presence it was given; and to such a one, no doubt, it was made perfectly clear by the illustrative movements of the witnesses. Therefore, we have accepted that understanding of it which the learned judge who heard it, without intimation of doubt on his part, or of objection from either party, assumed to be the correct one. Indeed, the brief of the plaintiff in error presents the matter in a manner not materially different, viz.:

"At the time of the accident Mason was standing on defendant's cross arm on the north side of the pole facing west, his legs astride the next cross arm above, his right foot resting on defendant's cross arm, his left foot also touching it, or swinging free in the air, as his body moved. While in that position, the telephone wire was handed to him, which he took in his right hand, and was apparently about to adjust to the outermost pin on the third cross arm. As he did so his left foot came in contact with defendant's wire, and from that received, apparently, an electric shock through his body, connection presumably being made through the telephone wire in his hand."

It has been thought desirable that this note should be made, in order that it may not be supposed that the evidence on this subject has not been

fully considered — not because it is deemed to be of vital importance, for it is not.

NOTE.—See note to *East Tenn. Teleph. Co. v. Simms' adm'r*, post.

FRANK HUBER, Respondent, v. LA CROSSE CITY RAILWAY
COMPANY, Appellant.

Wisconsin Supreme Court, March 27, 1896.

(92 Wis. 686.)

INJURY BY ELECTRIC SHOCK.—PROXIMATE CAUSE.

Plaintiff received injuries from an electric shock received under the following circumstances:

The electric light company by which he was employed was engaged, at the expense of the defendant, in removing a lamp which interfered with the erection or extension of defendant's trolley road; and plaintiff, a lineman of experience and acquainted with the location, was engaged in the work. The electric light pole was of wood and an iron trolley post stood very close to it, touching it at one place. The span wire was insulated from the trolley wire, and was also provided with circuit breakers near the posts. The railway was completed to the point in question, and had been in operation about a week. The end of the trolley wire, awaiting the extension of the line, was coiled and thrown over the span wire; this was plainly visible and clearly uninsulated. The span wire was thus liable to become charged as far as the circuit breaker. With actual or presumptive knowledge of all these facts, plaintiff touched with one hand the iron trolley post and with the other the span wire beyond the circuit breaker, the only way in which he could complete the circuit, and thus received the shock and injury.

Held, that the defendant could not have reasonably anticipated such an accident, and that its negligence was not the proximate cause of plaintiff's injury.

Cases of this series cited in opinion, appearing in bold faced type: *Block v. Milwaukee St. Ry. Co.*, vol. 5, p. 298; *Illingsworth v. Boston Elec. Lt. Co.*, vol. 5, p. 812.

APPEAL by defendant below from judgment of Circuit Court, La Crosse county.

Statement of facts by PINNEY, J.: Action to recover

damages sustained by the plaintiff by reason of alleged negligence of the defendant. The complaint charges that, at the time of the injury, the plaintiff was an employe of the Brush Electric Light Company, which maintained, at the northwest corner of the intersection of Main and Fourth streets, in La Crosse, a wooden pole, to support one end of a wire stretching across the intersection of the streets from northwest to southeast, from the center of which an electric street lamp was suspended, and to the knowledge of the defendant, the employes of the light company were obliged to and did climb said wooden pole to attend to such street lamp; that the defendant erected an iron post or pole close to and adjoining such wooden pole, and to which one end of a span wire was attached, which supported its trolley wire in and over the center of Fourth street, and such span wire was so near to the wooden pole as to be dangerous to employes of the light company while climbing it, unless it was properly insulated and free from the electric current in the trolley; that the defendant negligently allowed said span wire to become charged with a powerful current from the trolley wire, which it supported, and the plaintiff, a lineman of the light company, while climbing the wooden pole, without fault on his part, came in contact with said span wire and said iron pole, so as to form a circuit, and he received a shock which caused him to fall a distance of about twenty feet, to the ground, whereby he was seriously injured; that, at the time, said light company, by its agents and employes, of whom the plaintiff was one, was engaged, at the request of the defendant, the railway company, in removing the said lamp from its position. The acts of negligence relied on were: (1) The erection of said iron pole in such close proximity to the pole of the light company as to render the climbing of the latter dangerous, unless the defendant's span wire was properly insulated from the trolley; (2) in operating a portion of its railway

before it was fully completed, with the span wire in question uninsulated and charged with a heavy current that escaped from the trolley wire.

The answer denied the negligence charged, and averred that the defendant, at the time, had constructed and maintained its posts, trolley wires, and other appliances in accordance with the city ordinance; that at the time the light company, by the plaintiff as its employe and by its superintendent, was engaged in carrying out a contract between it and the defendant for the removal of its wires, lamps, etc., where they interfered with the erection of the defendant's line, and that, while so engaged, the plaintiff carelessly came in contact and connection with said span wire at a point beyond which it was insulated, and received the alleged shock; that he well knew the point at which the span wire was insulated, and the consequences of making a connection with the same, and that he was guilty of contributory negligence.

The defendant moved for a nonsuit at the close of the plaintiff's case, which was denied, and at the close of the evidence requested the court to direct a verdict for the defendant, which the court refused. The plaintiff had a verdict and judgment, from which the defendant appealed.

The evidence was that the trolley wire and span wire and the street lamp and poles were situated as stated in the complaint, the wooden pole of the light company being about thirty feet high and ten feet higher than the iron pole, and had a return wire from the lamp to the pole passing down it, to a ratchet near the bottom, so that the lamp could be raised and lowered to renew the carbons without climbing the pole, but to remove anything that got on the wires they would have to climb the pole; and at many street intersections in the line of the defendant's trolley, the light company maintained street lamps in a similar way, the position of which had to be changed when the defendant built its line, but at the defendant's

cost. Accordingly, the defendant entered into a contract with the light company to make such changes or removals, and it entered upon the work thereof, the defendant not interfering with or taking any part in it. The defendant had constructed its line south on Fourth street to Main street, which runs east and west, and it was intended that its line should turn upon Main street in both directions. The method of construction was that iron poles or posts were erected opposite each other on both sides of the street at intervals. Wires, called "span wires," cross the street at the top of these poles and support the main or trolley wire, which is attached to them by a "bell hanger" or "bell insulator," which, when properly constructed and in good condition, will prevent any escape of the trolley current to the span wire, and, as an additional precaution where the poles are iron, as in this case, and to guard against any possible leakage or defect in the "bell insulator," there was placed in the span wire, and between the trolley and each iron pole or post, about sixteen or eighteen inches from the post, a "circuit break," so that any current that escaped from the bell insulator would be arrested, and would not reach the iron post.

The evidence was that these appliances used by the defendant were of the best kind, and in good order, and tended to show that the construction and management of the defendant's line was under the control of a competent electrical engineer. The wooden pole of the light company, in question, was crooked, inclining towards the east and south, and its base was seven or eight inches east and a little south of the defendant's iron pole or post. About ten feet from the ground, by reason of the crook in the wooden pole, the two were in contact, and by reason of the inclination of the wooden pole to the south and east, there was an interval, from the point between them, gradually increasing to about eight inches at the top of the iron post, and opposite the span wire—the iron post

being west and a little north of the wooden pole. The span wire, running east from the top of the iron post, passed on the north side of the wooden pole, and about three or four inches distant. The west end of the circuit break in the span wire was seven and three-fourths inches to the east of the wooden pole, and the end of the span wire east of the circuit break was thirteen and three-fourths inches from the wooden pole, and the pole could be climbed from the south or east side without coming in contact with the span wire. A person climbing the wooden pole on the north side would have to pass over the span wire, and would usually come in contact with it in some way, but only with the portion of it between the iron post and the circuit break, which was dead or uncharged; but, in case of defect in both bell insulator and circuit break, should it be charged or "live," the person coming in contact with it, while adhering to the non-conducting wooden pole, would be safe, unless he at the same time came in contact with the iron post. The bell insulator and circuit break were in good order, and the span wire between the circuit break and the iron post which passed on the north side of the wooden pole was "dead."

When the defendant company had reached the point in question with the construction of its line, its trolley wire was attached to this span wire by the bell insulator over the center of Fourth street and on the north side of Main street, and quite a length of the trolley wire, intended to be used in curving on to Main street to the west, remained projecting south of the span wire, and was coiled up as far back as the bell insulator, and laid around and over the bell insulator, and upon the span wire and trolley wire to the north, so that, while the defendant operated its line so far as constructed, as it did continuously from August 8th to August 19th, when the accident occurred, this span wire became and was charged with the trolley

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current up towards said posts or poles as far as the circuit break. This coil of the trolley wire was bright new copper quarter inch wire, about four feet in diameter, projecting two feet over on the span wire on each side, not more than twenty-two feet from the poles or posts, and in plain sight, and there was nothing to indicate that it was insulated from the span wire on which it rested. A person climbing the wooden pole of the light company could be injured by the current in the span wire in but one way, namely, by touching the span wire east of the circuit break, and at the same time touching the iron post in the opposite direction to the west, so as to form a circuit with his body between the iron post and the live span wire beyond the circuit break. After the defendant's wires had been put up, the street lamp of the light company could not be lowered, because it would come in contact, and might cause an accident and it was necessary to put the light away from the defendant's wires.

At the time of the accident, McMillan, the superintendent of the light company, with nine years' experience as an electrician, and fully acquainted with the subject of insulation, with the plaintiff, undertook to make the necessary change in removing and changing the position of the street lamp. The plaintiff had done nearly all this work up to this time. He had had about five years' experience in attending to lamps, repairing, setting poles and other work, and had worked about a month in changing the lamps of the light company. He understood the method of construction and insulation of the defendant's lines, and the subject of insulation generally; had noticed both bell insulators and circuit breaks, and knew how they were attached, and what they were for, and had examined the manner of insulating the defendant's span wires. By direction of McMillan the plaintiff climbed the wooden pole on the north side, over and above the span wire and iron post, nearly to the top of the wooden

post, drew the lamp in from the center of the street, and let it down to McMillan, and came down the pole on the north side, climbing over the span wire again. McMillan then climbed the wooden pole on the east side, passed the span wire, and prepared to hang the lamp at the side of the wooden pole. Having occasion to let fall a piece of the lamp wire twisted into a spiral form or coil, he dropped it, intending to let it go down on the south side of defendant's span wire; but, for want of careful management, it caught the span wire at a point three and one-half or four feet east of the wooden post, and beyond the circuit break, so that from his position he was unable to get it off. He therefore directed the plaintiff to climb the pole again, and to take this coil off the span wire. The plaintiff climbed up on the north side of the wooden pole, as before, until his feet were about seventeen feet above the ground, and his head was higher than the top of the iron pole. He testified: "I stood on my left spur, reached out, lifted this wire [an insulated one] off, and dropped it down, and came back to the pole, somewhere near, with the intention of getting in position, and I got caught. I supposed the span wire was a dead wire. I don't know how I made the connection by which the current went through me. I did not put my other hand on the wire. There was a burn across three fingers on the back of the right hand. The left arm or wrist was burned on the inner portion. I had not noticed the coil of trolley wire that lay coiled, in part upon the span wire and in part upon the trolley. I did not see it at all. I don't remember that I had ever been at this place while the defendant was operating its line." Both the plaintiff and McMillan knew that the trolley was in operation, and cars had been running to that point for eight days. The plaintiff testified that, "if I had seen this coil of trolley wire lying upon the span wire at that point, I probably would have known and understood that the current of

electricity would have been conveyed to the span wire up to the circuit break; but I don't know. . . . In order to form a circuit my bare person had to come in contact both with the iron post and the span wire. Was wearing woolen clothes. Woolen clothes against the iron post would not form a circuit, if it was dry. Clothing was dry, and the iron post too." He further testified that he lifted the wire off the span wire with his left hand, having, at the time, his right arm around the wooden pole. That he did not then take hold of the span wire, or touch it with his left hand. "I got my left hand back somewhere near the pole. Can't tell you whether I was leaning against the span wire. Don't remember whether I touched the span wire or not."

Losey & Woodward and E. C. Higbee, for appellant.

Fruit & Brindley, for respondent.

PINNEY, J. (after stating the facts): 1. The plaintiff was engaged as a servant of the light company, and using its poles and appliances under the direction of its superintendent, performing an engagement that company had entered into with the defendant company to change the location and method of hanging the electric street lamps so that their use and management would not interfere with or embarrass the use and operation of the defendant's electric railway, for a consideration to be paid by the defendant. Under the circumstances, the defendant was bound to the exercise of reasonable care and caution in the management and control of its railway, and of the electric current which was its motive power, so as not to injure the employes of the light company while engaged in such work. It was bound to avoid acts the natural and probable consequences of which might be to inflict injury on persons thus employed, and, if it omitted such precautions as were reasonably necessary, under the circum-

stances, it would be liable for such damages as any one thus engaged might suffer, being the proximate result of such neglect of duty. The rule was stated by BRETT, M. R., in *Heaven v. Pender*, 11 Q. B. Div. 503, 509, that, "whenever one person is, by circumstances, placed in a position, with regard to another, that every one of ordinary sense, who did think, would at once recognize that, if he did not use ordinary care and skill, in his own conduct, with regard to those circumstances, he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger." This principle was referred to in *Zieman v. Kieckhefer E. Mfg. Co.*, 90 Wis. 503; in *Bright v. Barnett & Record Co.*, 88 Wis. 307, and in *Thomas v. Winchester*, 6 N. Y. 397. In *Heaven v. Pender*, *supra*, COTTON and BOWEN, JJ., declined to approve the view expressed by the Master of the Rolls to its broadest extent. But, in the subsequent case of *Thrussell v. Handyside*, 20 Q. B. Div. 359, 363, the view of BRETT, M. R., was expressly approved; HAWKINS, J., saying, "that, where a man is employed to do certain work, and knows that the work he is doing is dangerous to others, and that accidents are likely to happen, and knows that other persons are lawfully engaged in other work, and are under obligations to perform such work, the person engaged in the dangerous work is subject to the duty of using reasonable care, and taking precautions to prevent accidents arising from the work in which he is engaged."

2. As was said by NEWMAN, J., in *Block v. Milwaukee St. Railway Co.*, 89 Wis. 378: "The negligence is not the proximate cause of the accident unless, under all the circumstances, the accident might have been reasonably foreseen by a man of ordinary intelligence and prudence. It is not enough to prove that the accident is the natural consequence of the negligence. It must also have been the probable consequence."

Atkinson v. Goodrich Transportation Co., 60 Wis. 141, 163; *Barton v. Pepin Co. Agr. Soc.*, 83 Wis. 19; *McGowan v. C. & N. W. R. Co.*, 91 Wis. 147. A mere failure to ward against a result which could not have been reasonably expected, is not actionable negligence. Whether the negligence of the defendant was the proximate cause of the injury, so that it and the result stand in the relation of cause and effect, is a question for the jury, where the evidence is not clear, or the proper inference from undisputed evidence is in doubt. It is not, however, necessary that injury, in the precise form in which it in fact resulted, should have been foreseen. It is enough that it now appears to have been a natural and probable consequence. *Lane v. Atlantic Works*, 111 Mass. 136; *Hill v. Winsor*, 118 Mass. 258, 259.

The evidence on this subject is not conflicting, and the real question is as to the inferences which may be fairly drawn from the evidence, and whether they are in doubt. It appears that the defendant had substantially complied with the statute (Laws of 1889, c. 375, sec. 1), and by bell insulators and circuit breaks had provided by suitable insulation against injury to persons or property by reason of the leakage or escape of the current of electricity from the trolley wire. The trolley wire and the span wires were sustained at an elevation of about twenty feet in the air. The bell insulators were to prevent the escape of the electric current from the trolley wire, and the circuit breaks to prevent the span wires, if they should become charged from the trolley, from charging the iron posts by the sidewalks. All reasonable and proper precautions had been taken, it must be conceded, against any probable injury to persons or property in the streets or on the sidewalks or elsewhere, except, possibly, to those whose duty it was to repair and give suitable attention to the span and trolley wires of the defendant, and the wires of the light company, so far as necessary in the operation of the respec-

tive lines. All such persons were understood to be, as the plaintiff was, familiar with the application of electricity to such uses, and with the theory of insulation, as well as the use and functions of the bell insulators and circuit breaks. The introduction and use of circuit breaks must be regarded, of itself, to the apprehension and judgment of these trained and experienced operatives, as a signal of danger, a warning that any given span wire may be charged with a heavy current from the trolley, by leakage or otherwise. They cannot come near a span wire without being thus admonished, and of the general judgment in construction, that circuit breaks are necessary to secure immunity from electric shocks, and to prevent the iron posts from being charged with an electric current down to the streets. These are all parts of the lines with which they are familiar. It is to be considered that they understand the peril and the provided protection as well. The plaintiff was injured because the span wire became charged by coiling, over it and the trolley wire, a portion of the latter, designed to make the curve down Main street. There was no other apparent method of disposing of it for the time being, and no reasonable grounds for supposing that any prudent and careful operative would have failed to notice it under the circumstances; and, if he did not, the circuit breaks provided protection against the charged span wire, unless he came in contact with the span wire beyond the circuit break and the iron post at the same time. This, we think, the defendant had no reasonable ground to suppose, in the present instance, that the plaintiff would do. The defendant had been operating its railway to the point in question for eight days, beyond which it had not been completed, and the plaintiff had been at work all this time and for some time previous, along the line, in changing the location of the street lamps of the light company, and knew that the trolley wire had been kept charged to operate the railway, and the defendant

must have understood that he was familiar with these facts, as well as the near proximity of the iron and wooden poles, and the space between the iron poles and the outer end of the current break. These were obvious facts, and not to be mistaken or misunderstood. The injury could occur in only one way, as the plaintiff substantially tells us, namely, by his bare hand coming in contact with the span wire beyond the circuit break, and his other hand, or part of his bare person, coming in contact in the same instant, with the iron post, so as to pass the electric current through him. Could the defendant have reasonably anticipated, under these circumstances, the occurrence of an accident such as this? Ought the defendant to have foreseen it, in the light of attending circumstances? We think not. It clearly appears that the use of the wooden pole in climbing up or coming down was not dangerous, nor was it possible for the plaintiff, while climbing or clinging to it, to have received a shock even by touching the charged span wire, unless he completed the circuit, at the same instant, by touching the iron post with his naked hand or person. The defendant had no right to expect that an inexperienced operative would have climbed to such a point, much less that an experienced and competent one, with his knowledge of the situation, at the only possible point of danger, with the warning of the circuit break before him, would practically eliminate it as a means of safety, and, by placing his body substantially in its place, complete the electrical circuit, so that the current would necessarily pass through his body. It was not expected that he would have occasion to touch or come in contact with the span wire beyond the circuit break, or the iron post, for any purpose, and certainly not so as to complete an electrical circuit with his body.

We think the case of *Illingsworth v. Boston E. L. Co.*, 161 Mass. 583, where the right of use was given to the operatives of both companies in common, for that and

other reasons, is distinguishable. We hold, therefore, that the evidence did not make a case to go to the jury to show that the negligence of the defendant relied on was the proximate cause of the plaintiff's injury.

By the Court: The judgment of the Circuit Court is reversed, and the cause is remanded for a new trial.

NOTE.—See note to next case.

EAST TENNESSEE TELEPHONE COMPANY V. RICHARD SIMMS' ADMINISTRATOR.

Kentucky Court of Appeals, June 6, 1896. On motion for re-hearing, Dec. 19, 1896.

DEATH BY ELECTRIC SHOCK.—EVIDENCE.—AGENCY.

The secretary of a telephone company is not its agent in the sense that the company is bound by damaging admissions made by said secretary. Therefore, in an action based on the death of a person, caused by electric shock, alleged to have been due to negligence of the telephone company in maintaining a dead wire for a long time in close proximity to an electric light wire, in which action it was set up in defense that death was due to other causes, *held*, that a letter from the secretary, in which she stated that the dead wire caused the death, was inadmissible in evidence against the company.

(Upon motion for re-hearing):

Declarations of the secretary, after the accident, relative to removing the dead wire, *held* also inadmissible.

Testimony that the line was overcharged with electricity on several occasions prior to the accident, *held* admissible.

The custom of the best telephone companies relative to the manner of detecting defects and irregularities in their line is competent, if shown to be the best known method of such detection.

APPEAL by defendant from judgment of Circuit Court, Harrison county.

J. Q. Ward, for appellant.

Ward & Lafferty, for appellee.

PER CURIAM: The appellee, as administrator of Richard Simms, recovered judgment against the appellant for \$7,000 in damages for the death of his intestate, which was caused, it is alleged, by the wilful and gross negligence of the appellant and the electric light company. Briefly stated, the facts are that in 1887 the appellant, then operating a telephone system at Cynthiana, put up a wire from its central office in that city to the residence of W. T. Handy, about one mile out. On December 13, 1892, this wire was still in use by Handy, or in condition for use, under his lease or contract with the company, though it appears that he was away, with his family, in Florida, and his term of rental was out, or about out. Simms, as a tenant, occupied two rooms in the rear of the Handy residence, and, for purposes of protection, overlooked the premises. At about 10 o'clock on the night of the 13th, the family of Simms heard a noise in front of the residence, and, in company with his son and two nephews, he went around to the front porch with a lantern. They discovered the storm doors swaying back and forth, and, fastening them, they came down from the porch on to a pavement, when sparks were seen on some trellis wires about the porch. Simms stepped off the pavement, saying, "What is that?" at the same time reaching out towards the wires. His nephew exclaimed, "Don't touch it!" But at that instant Simms fell dead, and it is supposed that he had touched the wires with his outstretched hand, although there were no burns found on his hands or body. These wires had become charged with electricity from contact with the telephone wire leading from the box in the hall on to the porch, and thence to the ground. And the telephone wire had, in turn,

become overcharged from contact with the electric light wire within the city. Just how this came about forms the chief ground of dispute in this record. It appears that some two years prior to the night in question the telephone company had discontinued a wire theretofore rented to Victor & Whaley, and this wire had been taken down, save a few hundred feet which had been left on the poles. One end of this "dead wire" was connected with the Handy wire, and the other was fastened to a bracket on a pole of the Western Union Telegraph Company, also in use by the light company. This bracket became loose, and turned down, and the dead wire was left to sway and vibrate, sometimes touching the light wire. On the evening in question there was a heavy wind, and some rain, and at about 5 o'clock the bracket was so shifted that the two wires were brought in contact, the one perhaps resting on the other. The current of the electric plant had been turned on at about 4½ o'clock that evening, and a disturbance was noticed at the central office of the telephone company between 5 and 6 o'clock, when the wire in the keyboard was burned. An investigation made at once seems to have located the cause of the disturbance on the Handy wire, but there the matter rested for the night. The effort of the plaintiff was directed to showing negligence on the part of the telephone company in allowing its dead wire to hang for so long in close proximity to the light wire, and in so putting up the wire at the residence of Handy as that it could come in contact with the trellis wires then about the porch. Without setting out the details of the proof, it is sufficient to say that it conduced to show negligence in the particulars mentioned; and the court, therefore, properly overruled the appellant's motion for peremptory instructions upon the conclusion of the plaintiff's proof. Such a motion, however, was sustained for the light company. The appellant attempted to show that it had kept up the usual inspection of its

line, and had no reason to apprehend danger from the dead wire remaining on the poles; that the trellis wires were so placed by Handy, or others over whom it had no control, as that connection with its wire was made without its knowledge or consent and, moreover, that the deceased was the subject of heart disease, and likely to die suddenly, under undue excitement, and that he had probably died from natural causes, and not from an electric shock. The jury found against these contentions, and we proceed to notice the errors of law complained of.

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The court, however, committed a serious error, to the prejudice of the company, in permitting the alleged letter of Mrs. Lake to Handy to be read as evidence. She was the secretary of the company, it is true, but she was not its agent in making damaging admissions after the transaction occurred in which Simms lost his life. *Railroad Co. v. Ellis' Adm'r* (Ky.), 30 S. W. Rep. 979. The letter was to the effect that the dead wire caused Simms' death, and completely silenced the company's contention that Handy's trellis wires were placed in contact with the telephone wire without its knowledge, and thus caused his death, or contributed to it, or that his death was due to natural causes. Moreover, if otherwise competent, it must have been mere opinion, based on hearsay, as the writer had no personal knowledge of the facts, though the statement, coming from one connected with the company, had the force of an absolute admission and one fatal to the company's defenses. For the reason indicated the judgment is reversed, for proceedings consistent with this opinion.

UPON MOTION FOR RE-HEARING.

HAZELRIGG, J.:

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There are certain minor errors not expressly passed on

by us in the opinion, and counsel desire these should be acted on. The first complaint is that appellee was permitted to prove by Whaley a conversation between him and Mrs. Lake, in which the latter said she wanted the witness to take down the dead wire which, as she claimed, was a part of the line of Victor & Whaley, and witness declined because he contended it was not his business, etc. If this conversation was after the death of Simms, it clearly falls within the rule announced in the opinion as to the letter of Mrs. Lake, and would be incompetent. If before, it would seem to be competent. The bill of evidence does not disclose when it was. The testimony of Handy that the line was overcharged with electricity on several occasions prior to the occurrence under investigation was competent, as held below. The proof of Berkley, showing the custom of the best telephone companies in respect to manner of detecting defects and irregularities in their lines, would have been competent, if shown to be the best known method of such detection; and, as the avowal for the witness seems to state this, the court should admit it. It may be true that those not acquainted with this mysterious power or agency might think it a poor protection, if defects were not to be discovered and corrected until after the damage had likely been done. This would only show the custom or rule a poor one, and does not argue against its admissibility as evidence.

NOTE.—In the case of *John E. Cook v. Wilmington City Electric Company*, Delaware Superior Court, February, 1892, the charge to the jury in the trial court is reported, 9 Houst. 306, and 32 Atlantic Reporter, 643. The instructions given are abridged in the head-note in the last named report, as follows:

An electric street railway company, running its cars by overhead wires, must use every means to protect the public from injury regardless of expense, and must at once remedy wires broken by unavoidable accident.

A person who negligently walks into a live electric wire, of the dangerous character of which he is warned by the sparks proceeding from it, is negligent.

Where a pedestrian in a city is injured by a wire of an electric railway company, broken by an unavoidable accident striking him as it falls, the company is not liable.

In *Larson v. Central Railway Company*, 56 Ill. App. 263, damages were sought for the killing of a horse by shock from a trolley wire hanging loose in a street. It was held that a company using such a highly dangerous agent as electricity for propelling street cars is bound to the highest degree of care commensurate with the danger. Also that the fact that the company permitted the wire to hang where it did was *prima facie* proof of negligence.

In each of the thirteen cases preceding this note, beginning with *W. U. Tel. Co. of Baltimore v. State to Use of Nelson*, page 210, the ground of action was injury by shock from electric wires alleged to have been negligently placed or maintained. In all these cases, as well as in those reported in previous volumes of this series, the maxim *sic utere tuo ut alienum non laedas* is applied very strictly to electrical companies on account of the known power and danger of the agent employed by them; and they are held to very great diligence to keep their electric wires insulated and harmless at places where persons are liable to come in contact with them. This is especially laid down in *Griffin v. United Elec. Lt. Co.*, ante, p. 252; *McLaughlin v. Louisville Elec. Lt. Co.*, ante, p. 255; *Atlanta Consol. St. Ry. Co. v. Owings*, ante, p. 275; *Newark Electric Lt. & Power Co. v. Garden*, ante, p. 271; and *Huber v. La Crosse City Ry. Co.*, ante, p. 285.

In the three last named cases, the principle is applied in favor of employes of electrical companies, who are held to be entitled to protection when in the performance of their duties, from injury by shock from wires of companies other than their employers. To the same effect was the decision in *Illingsworth v. Boston Electric Light Co.*, vol. 5, p. 312. In *Hector v. Boston Electric Light Co.*, vol. 5, p. 300, it was held that under the circumstances the defendant owed the plaintiff no duty to have its wires insulated at the particular place where the injury occurred. And in *Augusta Railway Co. v. Andrews*, vol. 4, p. 378, the demurrer to the complaint was sustained upon the ground that the plaintiff was a trespasser; but the complaint as subsequently amended, so as to state that he was not a trespasser, was held sufficient, vol. 4, p. 381, note. In the *Huber* case, *supra*, while the rule of duty is expressly laid down, it was held that the defendant could not have reasonably anticipated the accident, and that its negligence was not the proximate cause of plaintiff's injury.

Cases in which injury by electric shock was sustained by employes of the companies owning the wires are grouped with other cases of injury to employes, and indexed under "Duty of Electrical Companies to Their Employes."

In *City Electric St. Ry. Co. v. Conery*, ante, p. 217; *W. U. Tel. Co. and City and Suburban Railway Co. v. State to Use of Nelson*, ante, p. 210, and *McKay v. Southern Bell Teleph. & Tel. Co. and Mobile St. Ry. Co.*, ante, p. 228; it was held that where the shock causing the injury was from a

telephone wire which had broken and fallen across an electric railway wire and thence to the ground, the injury was due to the concurrent negligence of both companies; and in the two last named cases a joint action against them was held proper. To the same effect is the decision in *Shelton v. United Electric Railway Company*, vol. 3, p. 477. In *Albany v. Waterliet Turnpike & R. Co.*, vol. 4, p. 367, it was held that such an accident was due to negligence of the telephone company alone, and that the electric railway company was not chargeable.

For reference to other cases on this subject, see vol. 5, p. 335, note.

JEREMIAH QUILL, Respondent, v. THE EMPIRE STATE
TELEPHONE & TELEGRAPH COMPANY, Appellant.

New York Supreme Court, General Term, Fifth Dept., December, 1895.

(92 Hun, 539.)

INJURY BY ELECTRICAL APPLIANCES.—PROXIMATE CAUSE.

While it is the rule, and a just one, that no one can be charged with a negligent omission of duty for failure to anticipate and guard against some contingency which would not have arisen, save under exceptional circumstances, the true test is that if the accident might reasonably have been anticipated, or if its occurrence would not, in the minds of reasonable men, be in the highest degree unlikely, the party may be chargeable with negligence.

Therefore, *held*, that the falling of an insulator simply resting upon a peg on a cross-arm of a high pole, without being screwed upon the peg in the usual way, the pole standing in a populous street, and having upon it many wires, which required frequent adjustment by linemen, was not "in the highest degree unlikely" to happen, and therefore that the question of negligence of some one was *prima facie* established in an action for damages to a person struck by such falling insulator.

Held, that the questions of whether the insulator was placed upon the peg in a negligent manner, and whether the insulator was placed in position by the defendant or another company, were properly submitted to the jury.

Held, also, that whether or not the defendant, which owned, maintained and controlled the pole, maintained the particular insulator, it became

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charged with the duty of keeping the pole and its appliances in such a condition of safety that travelers upon the highway should be exposed to unnecessary hazard therefrom.

Where several proximate causes contribute to an accident, either of which is an efficient cause, without which the accident would not have happened, it may be attributed to any or all of them. This rule applied, it appearing on the one hand that the accident would not have happened except for the act of the lineman, and on the other hand that it would not have happened had the insulator been securely attached to its peg.

APPEAL by the defendant from a judgment of the Supreme Court, entered in Cayuga county, upon the verdict of a jury at the Cayuga Circuit, and also from an order made upon the minutes denying its motion for a new trial.

The action was brought to recover damages for injuries sustained by a traveler in a street of the city of Auburn, by the falling upon him of a glass insulator from a pole upon which electric wires were strung.

The pole was 90 feet in height, and there were upon it about 20 cross arms. The pole was erected and owned by the defendant, which used all the cross arms, except two, which were in use. The lower cross arm was used by the Western Union Telegraph Company. Only a portion of the insulators upon this were in use. The fire alarm wire having become crossed with some of the wires upon this pole, one Hulbert, the lineman employed by the city, went upon the pole for the purpose of releasing the wire. While engaged in this work, a wire became caught under an unused insulator upon the lower arm, which was thrown off and caused the injury complained of. This insulator was not screwed in the usual way, upon a wooden peg inserted in the cross arm, but simply rested on the peg. The insulator was of the same size as others upon the same cross arm, and was of the kind generally used by the defendant, but smaller than those generally used by the Western Union Telegraph Company, although it sometimes used that kind.

Underwood, Storke & Seward, for the appellant.

Rich & Aiken, for the respondent.

Present: LEWIS, BRADLEY and WARD, JJ.

Judgment and order affirmed on opinion of ADAMS, J.

The opinion of ADAMS, J., was as follows:

ADAMS, J.: The only questions argued upon defendant's motion for a new trial at Special Term were those which involve the plaintiff's right to maintain his action against this defendant, the contention being that the evidence fails to establish any negligence upon the part of any one to which can be justly attributed the injury of which the plaintiff complains, but that if any is proven, it is negligence upon the part of the Western Union Telegraph Company, or an employe of the city of Auburn, and not upon the part of the defendant.

It will be well, therefore, to consider these several propositions in the order in which they are stated, and at the outset it may be conceded, as was suggested in the charge to the jury, that the circumstances attending the plaintiff's injury were somewhat extraordinary in their nature. That the insulator which caused the injury should have been lifted from its resting place at the precise moment of time when the plaintiff was standing in a position where he could be struck as it fell, is a circumstance certainly peculiar to this case, and because it is exceptional, it is argued that the defendant was under no obligation to guard against a contingency which there was so little reason to anticipate.

It is unquestionably the rule, and a very just one, that no person can be charged with a negligent omission of duty for a failure to anticipate and guard against some contingency, which would not have arisen save under

circumstances which are exceptional. *Hubbell v. City of Yonkers*, 104 N. Y. 434. The mere fact, however, that a similar accident never before happened does not necessarily repel the charge of negligence (*Cleveland v. N. J. S. Co.*, 125 N. Y. 299), the true test being, as stated in the last case cited, whether it is one which "might reasonably have been anticipated, or if its occurrence would not, in the minds of reasonable men have been anticipated, or if its occurrence would not, in the minds of reasonable men, be in the highest degree unlikely."

Measured by this standard, it is obvious, I think, that the case presented questions of fact which the plaintiff was entitled to have a jury pass upon, for although it may be claimed with great propriety that there was no good reason for anticipating an accident in all its details like the one in question, yet the possibility of a personal injury occurring by reason of the failure to properly adjust a glass insulator, of no inconsiderable size and weight, to its proper place upon a telephone pole can hardly be said to be so remote as to justify the claim that it is "in the highest degree unlikely" to happen. Here was a pole ninety feet in height with twenty cross bars or arms attached to it, and upon these arms were pegs for possibly 200 insulators, and over them were stretched a vast number of wires. This structure was located at the junction of two thoroughfares in a flourishing city, and by and around it hundreds of people were passing daily. The evidence discloses the fact that it frequently became necessary for the employes of the different companies using the pole to ascend it for the purpose of readjusting the wires, and, the better to accomplish this, a bridge had been constructed from an adjoining building, which rendered the pole and wires easy of access. Now, if this glass insulator was simply placed upon its peg and tipped over upon one side without being screwed on, as described by one of the plaintiff's witnesses, is it after all remarkable

that in the frequent changing of the wires, or in the adjustment of new ones, it should be jerked off and made to fall upon some person passing along the street below? Or is it inconceivable that even the swaying of the wires by a brisk wind might have produced the same result? In making these suggestions, I am not unmindful of the attempted demonstration 'upon the part of the defendant, of the utter impossibility of displacing an insulator from one of these wooden pegs, even when it is not firmly attached by means of the screw, but the evidence of the witness Hulbert, the lineman, who was trying to disentangle the wires, cannot be ignored, and, if it could be, the fact remains that the insulator was in some manner displaced and thrown to the ground, and this, in the absence of any explanatory circumstances, would seem to establish a *prima facie* case of negligence upon the part of some one. *Mullen v. St. John*, 57 N. Y. 567; *Crozier v. Read*, 78 Hun, 181; *Morris v. The S. & W. Co.*, 81 id. 1.

The claim that the fault, if any, was that of Hulbert, and not of this defendant, was submitted to the jury, and they were instructed that, if the insulator, having been properly attached, was displaced simply because of the force which was employed by him in raising the wire of the fire alarm telegraph, the plaintiff could under no possible circumstances recover. The issue thus raised having been submitted to the jury, their verdict must be regarded as conclusive upon the subject, and, therefore, it may be assumed that the insulator was placed upon the wooden peg in a careless and negligent manner, and so we have fairly presented for consideration the question as to the party who is responsible therefor.

The defendant sought to escape responsibility for the accident by claiming that the cross arm from which the insulator dropped was used exclusively by the Western Union Telegraph Company, and that, therefore, that company, and not the defendant, should be charged with the

consequences of the negligent act. It is true that the company did use this cross arm, so far as it was used at all; nevertheless, the evidence was such as would have warranted the jury in concluding that the insulator was placed in position by the defendant, for the telegraph company certainly had no wire attached to it, although it appears that one ran along by the side of it, and, as has been stated, it was of the same size and kind as the insulators used by the defendant.

But, assuming that the telegraph company did cause the insulator to be placed upon the peg in the manner described by the plaintiff's witnesses, yet I fail to see how this relieves the defendant from all share of responsibility for the result which followed.

It is expressly admitted by the answer that the pole in question was erected and maintained by the defendant, and if it saw fit to permit some other person or corporation to use a single cross arm as a matter of convenience, it nevertheless appeared, and was not disputed, that the defendant remained in virtual possession of the entire structure, and exercised a supervisory power over it, for its employes were constantly climbing the pole to readjust wires, and its superintendent testified that it was his business to inspect it, and that he knew what its condition was at the time of the accident.

It matters little, therefore, what was the precise relation existing between the defendant and the telegraph company, for if it was that of lessor and lessee, the pole being practically in the possession, and certainly under the control, of the former, it became charged with the duty of keeping it in such a condition of safety that travelers upon the highway should be exposed to no unnecessary hazard therefrom (*Khron v. Brock*, 144 Mass. 516; *Gray v. Boston Gas Light Co.*, 114 id. 149; *Milford v. Holbrook*, 9 Allen, 17), and there is no reason why the same rule should not apply where the partial occupation

is that of a mere licensee. In either case, so far as the present action is concerned, the negligence complained of may be predicated of the dangerous condition of the insulator, or the failure to discover its condition by the omission of proper inspection.

In other words, the defendant owning, maintaining and controlling the pole, was responsible for any negligent condition of its appurtenances which it permitted to exist by its passive acquiescence, whether such acquiescence followed actual knowledge or resulted from failure to acquire knowledge. *Gottlieb v. N. Y. L. E. & W. R. R. Co.*, 100 N. Y. 462; *Goodrich v. The N. Y. C. & H. R. R. Co.*, 116 id. 398; *Gray v. Boston Gas Light Co.*, *supra*; *Coupland v. Hardingham*, 3 Camp, 397; *Anderson v. Manhattan Ry. Co.*, 21 N. Y. Supp. 1.

But it is further insisted by the defendant's counsel that, even though there was an omission to fasten the insulator securely upon the cross arm, such omission cannot be said to have been the proximate cause of the plaintiffs' injury.

It is often a difficult matter to determine with any degree of accuracy what is the "proximate cause" of an accident, and it frequently happens in cases of negligence that several causes concur to produce certain results, one or all of which may be denominated "proximate."

This is peculiarly true of the case in hand, for it is absolutely certain that the plaintiff would have escaped injury upon the day in question, but for the intervention of a third party, for whose acts the defendant is in no wise responsible, so that it may be asserted with equal certitude that the raising of the fire alarm wire by Hulburt was a proximate cause of the consequences which followed. But, on the other hand, had the insulator been firmly attached to the peg upon which it rested—and once more, in considering this question, it must be assumed it was not—the raising of the wire probably would not have dis-

placed it and caused its fall. It would seem, therefore, that the case comes fairly within the rule which holds that where several proximate causes contribute to an accident, either of which is an efficient cause, without which the accident would not have happened, it may be attributed to any or all of them. *Ring v. The City of Cohoes*, 77 N. Y. 83; *Phillips v. N. Y. C. & H. R. R. Co.*, 127 id. 657.

The questions discussed upon this motion, as well as upon the trial, possess great interest and are not wholly divested of embarrassing features, but mature reflection and careful consideration, with the aid of such light as is furnished by the authorities cited, incline me to believe that the case was properly submitted to the jury, and that the verdict should not be disturbed.

The motion is, therefore, denied, with ten dollars costs.

NOTE.— See note to *Manning v. West End St. Ry. Co.*, *post*.

W. T. GARTHRIGHT V. RICHMOND RAILWAY AND ELECTRIC
COMPANY.

Virginia Supreme Court of Appeals, February 20, 1896.
(92 Va. 627.)

**ELECTRIC STREET RAILWAY.—DUTY TO USE PROPER APPLIANCES.—OVER-
CROWDING.**

In an action for damages for injuries caused by collision of a trolley car with a hook and ladder truck, defendant complained of an instruction to the jury that if they believed the collision was due either to failure to use a Sprague motor or to overcrowding, they must find the company was guilty of negligence, even though the motorman did everything in his power to prevent the collision.

Held, no error, even though there was not evidence sufficient to support the alternative as to the Sprague motor, it appearing that but for overcrowding the car might have been stopped in time to avoid the accident.

APPEAL by defendant below from judgment of Circuit Court of the city of Richmond.

Facts stated in opinion.

Wyndham R. Meredith, for the plaintiff in error.

Courtney & Patterson, for the defendant in error.

RIELY, J.: The judgment to which the writ of error was awarded in this case was recovered for injuries received in a collision between a car of the Richmond Railway & Electric Company and a hook and ladder truck of the Fire Department of the city of Richmond.

Three grounds are assigned for the reversal of the judgment.

The first is that the plaintiff in the suit was barred of the right to recover because of his own contributory negligence.

The case comes before us upon a certificate of the evidence, and in considering it we must apply the familiar rules applicable to a demurrer to evidence. These rules require us to accept as true all of the plaintiff's evidence, and all just inferences which could be properly drawn from it by a jury, and to reject all of the evidence of the defendant which conflicts with that of the plaintiff and all inferences which do not necessarily result from it. Many witnesses were examined on both sides, and there was considerable conflict in much of the testimony. It is unnecessary to rehearse it, but sufficient to say that, testing it by the above rules, the evidence clearly establishes the negligence of the defendant company, and does not justify the claim that the plaintiff was guilty of such contributory negligence that, but for the same, the accident would not have happened.

The second assignment of error relates to the instruction given by the court, numbered 2, which is as follows:

"The jury are further instructed that if they believe from the evidence that when the horses of the truck came in sight of persons on the defendant's car, the said car was at such a distance from the point of collision that the accident might have been averted but for the want of a Sprague motor on the car or the crowding on the platform of passengers preventing the motorman's use of his machinery, then the defendant company was guilty of negligence, and the jury must find for the plaintiff, even though they believe that the motorman on the car did all in his power to stop his car, unless they believe that the negligence of plaintiff or tillerman contributed to the accident."

The objection made to this instruction is that it pronounces the failure of the company to equip its car with a Sprague motor to be negligence, when there was no evidence before the jury tending to show that such motor was a necessary equipment of its car, or that the want of

it caused the accident in which the plaintiff was injured. The evidence upon this point was very meager. Only three witnesses, all of whom were called by the defendant, testified in regard to the matter. One of them, Mr. Hill, who had worked in the shops of the company, and was a conductor on one of its cars at the time he testified, but had never been a motorman, stated that this particular car was the only one that was provided at the time of the accident with a Westinghouse motor, and that the others were equipped with Sprague motors. When questioned as to which was the best machine for stopping a car suddenly, he answered that the Westinghouse "reverses slower," and that the Sprague "takes quicker than the other," whatever that may mean. Mr. Jackson, who was the conductor on the car, was asked by which motor could a car be stopped in the shortest distance, and replied that it was as easy to stop the car with the one as the other. Major Selden, the superintendent of the company, was the only other witness as to this matter. He stated that the company, at the time he testified, was using the Westinghouse motor almost entirely on its Main street line and the Sprague motor on its Clay street line. When asked which was the best motor, he stated, "I think the Westinghouse a little better;" and, when asked further, if a car could be stopped quicker with the Westinghouse motor than with the Sprague, he replied, "The difference is so slight, it is hardly appreciable." The foregoing is substantially all the evidence upon which the instruction complained of was based.

It thus appears that it was not testified to that the Sprague motor was a better appliance than the Westinghouse, or that at the time of the accident it had been tested and was in practical use by electric street railways, or had been adopted by them as a safer machine, or that the accident could have been averted if the car had been equipped with a Sprague motor.

It was the legal duty of the defendant company to provide its cars with suitable and safe machinery. It is incumbent upon a railway company, propelled by the powerful and dangerous agencies of steam or electricity, especially in a large and populous city, to use ordinary and reasonable care to avail itself of all new inventions and improvements known to it which will contribute to the safety of its passengers, and prevent accidents to others, whenever the utility of such improvement has been tested and demonstrated; but it is not required to have in use the latest improvements which human skill and ingenuity have devised to prevent accidents. Patterson's Railway Law, sections 245-247, and Elliott on Streets, 610.

The instruction was erroneous in singling out the Sprague motor, and making the liability of the railway company depend upon its failure to equip its car with such motor, if the jury believed that by its use the accident could have been averted, when it had not been shown in evidence that the Sprague motor was a better and safer appliance, or that it had been tested, and its superiority over the Westinghouse demonstrated.

It does not follow, however, that the judgment for that reason must be reversed. It is the settled rule of this court, recognized and acted upon in numerous cases, that if the court can see from the whole record that, even under correct instructions, a different verdict could not have been rightly found, or that the exceptant could not have been prejudiced by the erroneous instruction, it will not, for such error, reverse it. *Preston v. Harvey*, 2 H. & M. 55; *Colvin v. Menefee*, 11 Grat. 87; *Kincheloe v. Tracewells*, id. 587; *Bank of Danville v. Waddill*, 27 Grat. 448; *Brighthope Railway Co. v. Rogers*, 76 Va. 443; *W. U. Tel. Co. v. Reynolds*, 77 Va. 173; *Snouffer v. Hansbrough*, 79 Va. 166; *Penn v. Hatcher*, 81 Va. 25; *Railroad Co. v. McKenzie*, id. 71; *Payne v. Grant*, id. 164;

R. & D. R. Co. v. Norment, 84 Va. 167; *Commonwealth v. Lucas*, 84 Va. 303; *Wager v. Barbour*, 84 Va. 419; *Bernard v. R. F. & P. R. R. Co.*, 85 Va. 792; and *Richmond Granite Co. v. Bailey* (decided at the present term) *ante*, p. 554. See also, Sack. Instruct. Juries (2d ed.), 24.

The collision between the car and the truck took place at the intersection of Main and Third streets. The car was passing down Main street, and the truck was proceeding along Third street.

It appears from the evidence that the company had the right, under the law, to run its cars at as great a rate of speed as six miles an hour; that this car was capable of seating twenty-two persons, and could comfortably transport as many as fifty persons; that the cars could be stopped within a distance equal to their length, or at most within a distance equal to a length and a half of a car, which was generally understood by the public; and that this particular car was about twenty-two feet long, including its front and rear platforms. It also appears from the evidence that the car at the time of the collision was crowded with passengers to its utmost capacity, and that both platforms, and even the steps, were thronged; it being variously estimated that there were not less than from sixty to eighty people on the car. So crowded and jammed together were they that the conductor was unable to collect the fare from half of them, and the motorman unable, as testified to by some of the witnesses, to have free command of his brake. As to the foregoing facts there was no material, if any, conflict between the evidence of the plaintiff and that of the defendant.

There was very much conflict, however, in the evidence in other material respects. If we look to that of the plaintiff alone, it appears that the car was somewhere between fifty and ninety feet—these being the two extremes of the estimates of the witnesses—above Third street when the truck reached Main street, and started to go across the

car track; and that it could have been easily stopped, and the collision prevented, if the car had not been overloaded with passengers, and running at the rate of eight to twelve miles an hour—much in excess of the speed allowed by law. Upon this evidence, it could but be held that the company was guilty of gross negligence, irrespective of the kind of motor with which it was equipped.

If we turn now to the evidence of the defendant, it appears that the witnesses estimated that the car was going slower than usual—at a speed of only three to four and a half miles an hour—and that it was from forty to fifty feet from Third street when the truck was first seen by persons on the car, passing rapidly from Third street across the track of the railway. There was then ample distance within which the car could ordinarily have been brought to a stop with either the Westinghouse or Sprague motor, and the collision been averted. After the truck, which, together with the horses, measured fifty feet, was seen by the passengers, and was, or should have been, seen by the motorman, it had nearly time enough to clear the track of the railway before the car struck it, the car having struck the truck immediately in front of its hind wheels, about forty-two feet back from the heads of the horses drawing it. If the car, with a full complement of passengers, but not loaded beyond its proper capacity, was capable of being stopped within a distance equal to its own length, which was twenty-two feet, or at most within a space less than twice its length, when running at its maximum speed of six miles an hour, as the evidence shows, it follows that it could have been brought to a stop in a still shorter distance, if going at a rate not exceeding four or four and a half miles an hour. The car had not less than fifty feet, and probably considerably more, within which to be stopped after the truck was seen about to cross the railway track, when ordinarily half of this distance would have sufficed. It is self-evident that the heavier

the load, the more unmanageable the car, and the greater the distance required within which to stop it. And this is fully confirmed by the testimony of Major Selden, an expert electrician, and the superintendent of the company, than whom no witness was more competent to speak. In answer to the question what would be a reasonable distance within which to stop the car, he replied: "From all accounts, they had a very heavy load; probably seventy or eighty passengers. I would estimate that that car weighed at least 15,000 pounds, if it had eighty passengers, knowing the weight of the car and motor. . . . I don't think a car with the weight that that car had on could be stopped in less than fifty or sixty feet, going at any speed." This being so, it is manifest that the collision between the car and the truck was caused by the crowded and overloaded condition of the car, and not at all due to the particular motor with which the car was equipped. Upon the whole evidence, therefore, the verdict was right, and the railway company could not have been prejudiced by the error contained in the instruction complained of.

The people of a city and vehicles have the same right to pass along an intersecting street as the car has to go across it. "The car has a right to cross and must cross the street, and vehicles and foot passengers have a right to cross and must cross the railroad track. Neither has a superior right to the other." *O'Neil v. Railroad Co.*, 129 N. Y. 125; *Buhrens v. Railroad Co.*, 53 Hun, 571, affirmed 125 N. Y. 702; *Chicago City Railway v. Young*, 62 Ill. 238; and Booth on Street Railway Law, sec. 304, and cases there cited. And it is gross negligence in a street railway company to overcrowd and load down its cars with passengers beyond any reasonable and proper limit, and, consequently, not to be able to control and stop them readily as they approach an intersecting street, in

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case it may be necessary to do so to avert a collision or prevent an accident.

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[The portion of the opinion here omitted relates solely to the amount of damages.]

NOTE.—See note to *Manning v. West End St. Ry. Co.*, *post*.

MICHAEL DEVINE, AS ADMINISTRATOR, &C., OF JAMES DEVINE, DECEASED, v. THE BROOKLYN HEIGHTS RAILROAD COMPANY.

New York Supreme Court, Appellate Division, Second Department, February, 1896.

(1 App. Div. 237.)

INJURY BY ELECTRICAL APPLIANCES.

The employes of an electric street railway, while engaged in stringing feed wires, allowed a wire to lie in the bed of a gutter on a public street for a distance of thirty feet or more, and then raised it suddenly to a height of about twenty feet, without giving notice to passers by of such intended action. As a result, a boy was caught by the wire, thrown into the air, and killed by the consequent fall. *Held*, that a nonsuit was improperly granted.

APPEAL by plaintiff from judgment entered in Kings county clerk's office upon dismissal of complaint directed by court after trial.

Almet F. Jenks, for the appellant.

S. Stewart Whitehouse, for the respondent.

WILLARD BARTLETT, J.: The complaint in this action alleges and the answer admits that on the 19th day of

July, 1893, the defendant corporation was constructing an electric railroad through and along Second avenue, in the city of Brooklyn, and was engaged in stringing or hanging its cables or feed wires on iron posts erected on said avenue.

The complaint further alleges that on that day, while James Devine, the plaintiff's intestate, was crossing Second avenue, the defendant, its agents and servants, conducted themselves so negligently that one of the cables or feed wires which they were at that time erecting, stringing or hanging, caught said James Devine and carried him upwards in the air, a distance of about twenty feet, from which height he fell to the ground with such violence as to suffer injuries from which he died. This allegation of negligence was denied by the answer. The plaintiff gave evidence tending to support it, and, at the close of his case, the counsel for the defendant moved for a dismissal on two grounds: *First*, that the proofs failed to show any negligence on the part of the defendant or the absence of contributory negligence on the part of the lad who was killed; and, *second*, that the place where the accident occurred had not been shown to be a public street. The court granted the motion, not on the ground that the place was not a public street, but because, in the opinion of the learned trial judge, the plaintiff had failed to prove any negligence on the part of the defendant.

The accident happened on Second avenue, between Thirty-fifth and Thirty-sixth streets. The evidence showed that at the time of the accident Second avenue, from Twenty-eighth to Sixty-fifth streets, was an open thoroughfare; that it was paved, curbed and flagged, and that it was used as a public street by the people living in that district and the general public. In view of these facts, it was wholly immaterial, so far as the plaintiff's cause of action was concerned, whether that particular part of the avenue in which the accident happened had actually been

opened by legal proceedings instituted by the municipal authorities. Second avenue at that point was in public use as a public street, and the plaintiff's intestate had just as much right there as the agents of the defendant. The trial court was right, therefore, in refusing to base the dismissal of the complaint on this ground.

But we do not think that the complaint should have been dismissed at all. The testimony of those who witnessed the accident, if believed by a jury, would amply warrant the inference that the agents of the defendant did their work in a careless and negligent manner. They were engaged in hoisting an electric cable into position on poles along the side of the street. Several hundred feet of this cable had been hung on the cross bars at the top of the poles and allowed to drop down in loops. To get the cable into position it was then hauled taut by means of a team at one end. The loop between Thirty-fifth and Thirty-sixth streets came down to the ground and lay in the gutter for a distance of about thirty feet. While the cable lay in this position a group of lads, among whom was the plaintiff's intestate, a boy about eight years of age, started to cross the street. As James Devine stepped across the wire the men engaged in stringing the cable gave the signal for the team to go ahead; the cable as it was made taut rose in the air, catching the lad between the legs and tossing him up a distance of twenty or twenty-five feet. This fall fractured his skull and he died five days afterward.

In granting the motion to dismiss the complaint the learned trial judge seems to have acted upon the view that the cable was not in a place where it would be likely to entangle horses, vehicles or persons, and that it was raised in such a slow manner that no negligence could be predicated of the way in which the work was done. "Any person passing over it," he said, "would know it was not a thing that shoots in the air or was propelled in such a

way as to strike persons suddenly and injure them." It seems to us, however, that a cable or wire, lying in the bed of a gutter on a public street for a distance of thirty feet or more, is something which is extremely likely, in the ordinary course of things, to interfere with the free use of the street by persons entitled to use it, particularly when it is liable at any instant to be raised from its position to a height of many feet above the ground. To put a cable or wire in such a place and raise it suddenly, without taking any means to notify persons on the street of its presence or the intention to lift it, would clearly be negligent as to any one lawfully upon the street and who was injured thereby while in the exercise of due care himself. The assumption that the movement of this particular cable, on this particular occasion, was slow, is directly at variance with the proof. If the cable had moved slowly it would be utterly impossible, in the nature of things, that the deceased lad should have been thrown twenty feet up into the air. The eye witnesses of the accident agree upon this point, and for the purposes of the present appeal their testimony must be taken as true. The inference to be drawn from it is that the motion of the cable, instead of being moderate, was more like that of a bow string when an arrow is discharged.

We are clear that there was a question for the jury in this case. The judgment appealed from must be reversed and a new trial granted, costs to abide the event.

All concurred.

Judgment reversed and new trial granted, costs to abide the event.

NOTE.—See note to *Manning v. West End St. Ry. Co.*, post. .
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L. F. LUNDEEN, Respondent, v. LIVINGSTON ELECTRIC
LIGHT COMPANY, Appellant.

Montana Supreme Court, October 14, 1895.

(17 Montana, 82.)

INJURY FROM ELECTRICAL APPLIANCE.—PROXIMATE CAUSE.

A post from four to six feet high, placed in the carriage way of a city street, and a guy wire attached to it four or five feet from the ground, for the purpose of supporting a pole for electric wires, is a dangerous obstruction, the danger of which should have been foreseen by the company creating it.

The injury complained of happened in this way: The plaintiff, who was on horseback, had just been passed by a man, also on horseback, when his horse became frightened, and collided with and broke the guy wire, which recoiled, wound itself around plaintiff's horse, and threw her to the ground.

Held, also, that though the accident would not have happened but for the fright of the horse, neither would it have happened but for the wrongful obstruction; and that there being two proximate causes of the injury, of which defendant's wrongful act was one, defendant was liable.

APPEAL by defendant from judgment of District Court, Park county.

Statement of facts by PEMBERTON, C. J.:

This is an action for damages for personal injuries.

It appears from the record that the defendant corporation was, on the 3rd day of July, 1892, the owner of a franchise obtained from the city of Livingston, authorizing it to own and operate an electric light plant for the purpose of lighting said city, and was, on said day, operating said plant, with poles and wires put up and established in and along the streets thereof. It became its duty, under said franchise, to so operate said plant that it should in no

way obstruct the free use of the streets, alleys and public ways of said city. In placing its poles on which its wires were strung, the company had established a pole on the corner of Second and Park streets. To strengthen and support this pole, a guy wire was run from it to a post planted across Second street, in Park street, a few feet from the sidewalk on said Park street. This post, it appears, was from four to six feet high, and the guy wire was fastened around it four or five feet above the ground, and extending thence to the pole across Second street.

It appears that on said 3rd day of July the plaintiff was riding at a moderate gait, on horseback, along said Park street, in company with one of the witnesses. Near the intersection of said streets a man by the name of Bender, also on horseback, passed the plaintiff. Here Bender's horse became frightened, and for a time unmanageable, and shied across the street, and ran against the guy wire, and broke it near the post to which it was fastened. The broken wire recoiled, and wound itself around the waist of the plaintiff, who was riding in the rear of Bender, pulled her from her horse to the ground and inflicted upon her serious injuries, to recover damages for which this suit is brought.

The defendant denies that it was guilty of negligence by placing and maintaining the post and guy wire in and along the streets of said city, as alleged in the complaint. It also denies the damages. The case was tried with a jury, who returned a general verdict for the plaintiff in the sum of \$500. At the request of the defendant the following special findings of fact were submitted to the jury, and made and returned by them: "First. Was the pole and guy wire of the defendant company, which is alleged to have caused the accident in this case, so placed as to be dangerous to the traveling public in the ordinary use of Park and Second streets in the city of Livingston? Answer. Yes. Second. Did the defendant company use

due and ordinary care in placing the said pole and guy wire where it was placed? Answer. No. Third. Would the accident have happened, had not the horse of the witness Bender run against the pole? Answer. No." Judgment was rendered for the plaintiff, in accordance with the verdict and findings. From this judgment and the order refusing a new trial, the defendant appeals.

Savage & Day, for appellant.

John T. Smith and A. J. Campbell, for respondent.

PEMBERTON, C. J. (after stating the facts): The defendant contends that the evidence is insufficient to sustain the verdict, in that there is no evidence that the post and wire, or either of them, constitute an obstruction of the free use of the streets, in their ordinary and usual use.

We think the evidence is ample to support the finding in this particular. The evidence is that the post to which the wire was attached was five or six feet high; that the wire was fastened to it about four or five feet above the ground. The post was placed in the street some two feet, at least, from the edge of the sidewalk. We think that the wire was attached to the post so near to the ground that if a horse, being ridden or driven by the post, shied and ran under the wire, injury would be almost inevitable to the rider or driver. The wire was hung so low that a person stepping off the sidewalk, at or near the post, in the night time, and attempting to pass under the wire, would be liable to receive serious injury by contact with it. A man of ordinary height could not pass under the wire, at or near the post, without his head coming in contact therewith. We think the post and wire were not only obstructions, but dangerous ones. It seems that ordinary foresight and prudence would have enabled the defendant to have foreseen the probable consequence of placing the

post and wire in the street in the manner in which they were placed.

Whether placing the post and guy wire in the street by the defendant constituted an obstruction to the free and ordinary use thereof was [a question of fact to be determined by the jury. *Hayes v. Railroad Co.*, 111 U. S. 228; *Railway Co. v. Prescott*, 8 C. C. A. 109; *Sweeney v. City of Butte*, 15 Mont. 27.

The real controversy involved in this case, we think, is found in the instructions given and refused by the court. Instruction 2, as given by the court, is as follows: "The court instructs the jury that if they believe from the evidence that the plaintiff was injured and sustained damage as charged in the complaint, and that such injury was the combined result of an accident and of an obstruction in said Park street, and that the damage would not have been sustained but for such obstruction, although the primary cause was a pure accident, still if the jury further believe from the evidence that the plaintiff was guilty of no fault or negligence on her part, and the accident one which common prudence and ordinary sagacity on the part of the plaintiff could not have foreseen and provided against, then the defendant is liable, provided the jury believe from the evidence that the defendant was guilty of negligence, either in the placing of such obstruction in the street in such a manner as to prevent the free use thereof, or in not removing the same, if the same was an obstruction to the free use of said street."

The court refused an instruction requested by the defendant, as follows: "You are further instructed that although you may believe from the evidence that the poles and wires thus placed in Park street by the defendant were dangerous to the traveling public, in their ordinary use of the street, yet if you believe that the injury to the plaintiff was approximately caused by the act of the witness Bender's horse, while running away, in running against

said pole or wire, and would not have happened but for the act of the said horse, you will find for the defendant."

The defendant contends that the court erred in giving said instruction, and in refusing to give the one requested by it. The contention of the defendant is that plaintiff was injured as a result of Bender's horse running against and breaking the guy wire, and that although the defendant was guilty of negligence in placing the wire in such a place and condition that the horse, under the attendant circumstances, would run against and break it, still it is not liable for damages for the injuries sustained by plaintiff. This contention proceeds upon the hypothesis that the placing of the wires in the street by the defendant must have been the sole cause of the injuries of the plaintiff; that the defendant is not liable for injuries resulting from an accidental intervening or other proximate cause, notwithstanding its negligence in placing the wire in the street. The defendant contends that the plaintiff would not have been injured if the horse had not run against and broken the wire, and, therefore, the defendant is not liable, however negligent it was in putting the wire in the street.

Brennan v. City of St. Louis, 92 Mo. 482, is very similar, in its facts and principles involved, to the case at bar. In that case the plaintiff, a child three years old, was with her sister, thirteen years old, who was pushing a baby carriage with a baby in it, and were all on the sidewalk, close to a ditch which had existed for some months, when another little girl came up, stumbled against the plaintiff, and both fell into the ditch, and plaintiff's leg was broken. In discussing that case the court said: "The first contention is that plaintiff should have been nonsuited because, from all the evidence, it appears the condition of the street was not the cause of the accident, but that it was caused by the stumbling of the other girl. It is true, no amount of care on the part of

the city government can prevent children, or, for that matter, grown people, from stumbling. All this does not relieve the city from the necessity of keeping the streets in a reasonably safe condition, though the want of care on the part of the person injured may prevent a recovery. Cases are to be found where it seems to be held, under like circumstances, that, in order to recover, it must be proved that the injury was occasioned solely by the neglect of the defendant, and not the neglect of the defendant combined with some accidental cause. But this court, in discussing a like question in *Bassett v. City of St. Joseph*, 53 Mo. 290, *loc. cit.* 300, said: 'It is true that, if it had not been for the attempt of the mule to kick, the injury might not have occurred; and it is equally true that, if there had been no excavation at hand, the kicking of the mule would have been harmless.' And further on the conclusion is reached that, if the plaintiff was without fault, she would have a right to recover, notwithstanding the cause contributing to the injury was the attempt of the mule to kick plaintiff, and she, attempting to protect herself, fell or jumped into the excavation. The same principle, that the plaintiff may recover where he is in the exercise of ordinary care and prudence, and the injury is attributable to the defective street, with some accidental cause, was again asserted in *Hull v. Kansas City*, 54 Mo. 598, and must be taken as established law in this State."

So while it may be true that plaintiff here would not have been injured if the horse had not run against and broken the guy wire, it is also true that the horse would not have run against and broken it if defendant had not negligently placed it in the street.

In *Chicago & N. W. Railway Co. v. Prescott*, 8 C. C. A. 109, at page 242—a case quite similar to the one at bar—the court say: "With respect to the suggestion that the injuries complained of were immediately occasioned by the sudden shying of the horse which the plaintiff was

driving, it is only necessary to say that the shying of the horse cannot be regarded as the sole proximate cause of the injury. The obstruction which had been placed in the highway directly contributed to the accident, and the jury was justified in so finding." And see authorities cited.

This authority holds that there may be more than one cause contributing to the injury, and that if the obstruction placed in the street contributed to the injury, and the shying of the horse was not the sole cause, then the defendant was liable. The same doctrine is asserted in *Ivory v. Town of Deerpark*, 116 N. Y. 476.

In *Hayes v. Railroad Co.*, 111 U. S. 228, a boy walked upon defendant's track, and was injured. It was the duty of defendant to fence its track. In this case the road contended that the want of a fence was not the cause of the injury; that the cause of the injury was the boy's negligently going upon the track. In other words, the defendant contended that the want of a fence was not the sole proximate cause of the injury. The court, in treating this contention, said: "It is further argued that the direction of the court below was right, because the want of a fence could not reasonably be alleged as the cause of the injury. In the sense of an efficient cause—*causa causans*—this is, no doubt, strictly true; but that is not the sense in which the law uses the term in this connection. The question is, was it *causa sine qua non*; a cause which, if it had not existed, the injury would not have taken place; an occasional cause? And that is a question of fact, unless the causal connection is evidently not proximate."

We think it was the duty of the defendant to have placed this guy wire so high above the ground that persons could pass under it, either on foot or horseback, in the day or night time, without danger of being injured. Placed as it was, it was not only an obstruction to the free and ordinary use of the street, but it was dangerous to the safety of persons who had the right to travel the streets. We

think that a reasonably prudent person must have foreseen, when stringing this wire in the street as it was strung, that just such accidents and calamities were liable to occur as happened to the plaintiff in this case. Persons and corporations acquiring franchises and privileges to use the streets of towns and cities in this State, for profit, should be held to a strict observance of legal obligations to guard and protect the persons, lives and property of the inhabitants thereof.

We have treated all the questions presented which we deem material to a determination of the case. We think the case was properly and fairly tried, and the right result reached. The judgment and order appealed from are affirmed.

Affirmed.

DE WITT and HUNT, JJ., concur.

NOTE.—See note to next case.

OTIS D. MANNING V. WEST END STREET RAILWAY COMPANY.

Massachusetts Supreme Judicial Court, May 23, 1896.

(166 Mass. 230.)

INJURY BY ELECTRICAL APPLIANCE.

A person walking in the street having been injured by a switch stick, which flew from the hands of the conductor of a trolley car, while attempting to free the trolley from a frog in the overhead switch in which it had caught, *held*, that the questions of negligence and contributory negligence were properly submitted to the jury.

Ugola v. West End St. Ry. Co., vol. 4, p. 389, cited.

APPEAL by defendant below from judgment of Superior Court, Middlesex county.

G. L. Mayberry, for the plaintiff.

M. F. Dickinson, Jr., for the defendant.

HOLMES, J.: This is an action for personal injuries caused by the plaintiff's being struck by a switch stick which flew from the hands of a conductor of the defendant as he was using it on top of an electric car to free the trolley, which had caught in a frog at the junction of some overhead wires. The case is here on the defendant's exceptions.

The first question argued is the usual one of the plaintiff's care. What is due care depends upon the nature of the accident, and the degree of danger according to common experience under the known circumstances. The plaintiff was on the sidewalk, either walking or momentarily stopping. Putting in the most favorable way for the defendant, the jury at least were authorized to find that the plaintiff was not bound to take special precautions against such a missile from such a source. The jury were instructed that if the plaintiff stopped and stood there simply to look, and the accident took place while he was doing so, he could not recover. This certainly was sufficiently favorable to the defendant. *Smethurst v. Barton Square Church*, 148 Mass. 261, 266.

Next it is said that there was no evidence of negligence on the part of the defendant. The conductor must be taken to have known that he was in a public street, in which there were or might be travelers, and therefore must be taken to have known that, if the stick did fly with violence from his hands, there was a danger to passers, similar, although less in degree, to that which would have attended the firing of a pistol into the way. Apart from the possibility that he might receive an electric shock sufficient to make him let go his hold, the jury were at liberty to say, from their experience as men of the world, that under such circumstances such an accident commonly does not happen, unless the stick is carelessly handled;

that it is in the power of the holder to see that he does not submit it to such a strain as to maké it possible that it should be torn from his hands, and to infer from those general propositions of experience that there was negligence in the particular case. See *Graham v. Badger*, 164 Mass. 42, 47; *Ugla v. West End Street Railway*, 160 Mass. 351; *White v. Boston & Albany Railroad Co.*, 144 Mass. 404.

A ruling was asked that there was no evidence that the accident was caused by defective construction of the trolley wires and trolley pole. The question is not what we should have found, had the question been submitted to us. We cannot say that the jury were not warranted in finding the arrangements defective from the fact of the trolley leaving the wires and getting so firmly jammed, and the explanation of what the arrangements were, and what was possible, especially when coupled with evidence, let in without objection, that similar accidents had occurred there half a dozen times before, and an admission of the defendant's expert that if that was true the place required attention. See *Feital v. Middlesex Railroad*, 109 Mass. 398, 405. If there was negligence, and the later acts were proper, in view of the exigency, the only question would be that of remoteness, to which we shall refer in a moment.

We must deal with the fitness of the switch stick for the use to which it was put, in the same way as with the construction of the wires and trolley pole. The jury possibly might have inferred that alone, without India rubber gloves, it gave rise to an unnecessary danger of an electric shock, and thus of escaping from the holder's hands.

There remains only the question whether the damage complained of was too remote to be recovered for in any of the possible aspects of the plaintiff's case. We are of opinion that even at the most distant moment, the possible negligence in the arrangement of the wires was not so remote that that part of the case could be taken from the

Manning v. Railway Co.

jury on the ground that they were not at liberty to find that, in the language of the court, such negligence was the efficient means and instrumentality by which the injury took place. Precisely what might happen as a consequence could not be foreseen, of course. But the general nature of what would have to be done, and what was done in fact, could be foreseen, and the general nature of the dangers attending the attempt in the place was sufficiently plain. The language in *McDonald v. Snelling*, 14 Allen, 290, 295, must not be taken to require the possibility of any more accurate foresight as a condition of liability. Cases of recovery for much more improbable accidents can be found in the books. *Powell v. Deveney*, 3 Cush. 300.

The judge, no doubt, would have called the attention of the jury to the question of remoteness more specifically, had he been asked to do so; but it does not appear to us that the defendant ought to have escaped, if its negligence was proved, and we think it clear that a verdict for the defendant could not have been ordered on that ground.

Exceptions overruled.

NOTE 1.—In the last five cases, beginning with *Quill v. Empire State Teleph. & Tel. Co.*, ante, p. 808, electrical companies were charged with negligence, in the use of their appliances, or with the use of improper appliances.

The following are memoranda of additional cases of the same general nature.

In *Kyle v. Southern Electric Light & Power Co.*, Penna. Supreme Court, April 6, 1896 (84 Atl. Rep. 323), an action based on the alleged negligent injury of a young boy by the falling of a pole which workmen in the employ of defendant were taking down, it was held that the question of defendant's negligence was properly submitted to the jury.

"It was the duty of the defendant to furnish sufficient men and adequate appliances for the work of taking down the pole, and it was liable for the consequences of its failure to do so. If it discharged its duty in this respect, it was still answerable for the consequences of the negligence of its employes in the performance of the work. Whether it did discharge its duty in the premises, and whether its employes exercised the care required by the circumstances, were questions for the jury, under proper instructions from the court."

In *Erslew v. New Orleans and Northeastern R. Co., New Orleans Traction Co. and New Orleans City & Lake R. Co.*, Louisiana Supreme Court, Dec. 14, 1896 (21 So. Rep. 153), an action for damages caused to his parents by the alleged negligent killing of their son, a brakeman in the employ of a steam railway company, by being brushed from a car by a guy-wire used to support a post of a trolley railway, the opinion is epitomized in the head-note prepared by the court, as follows:

"It is negligence on the part of an electric street car company, in the construction and establishment of its plant, to so place one of its guy wires over the track of a steam railway company as not to afford sufficient space for the latter's trains to easily and conveniently pass, without risk of danger and injury to its servants and employees.

It is negligence on the part of the steam railway company to permit an electric street car company to so construct and maintain over its tracks a guy wire that it will endanger the lives of its servants and employees.

If an employe of the steam railway company knew or ought reasonably to have known the precise danger to him of the guy wire of the electric street car company, in the course of his employment, and saw fit, notwithstanding, to continue in it, he might be held to have assumed the extraordinary risk, as well as the ordinary risks, of his service. But this consequence must rest upon positive knowledge or reasonable means of positive knowledge of the precise danger assumed."

NOTE 2.—The editor is indebted to Hardin H. Herr, Esq., of Louisville, for the opinion of Hon. STERLING B. TONEY, judge, in the action of *Kaufman, Straus & Co. v. Louisville Electric Light Co., Louisville Gas Co. et al.*, tried in Jefferson Circuit Court, Law and Equity Division, December term, 1895.

The plaintiffs sought to recover, and recovered, over \$200,000 damages for the destruction of a stock of merchandise in their store, by a fire caused by the explosion of a steam boiler used in the production of electricity.

Aside from the issues of fact as to the cause of the fire and amount of damages, the chief question considered was as to the liability of the defendant, Louisville Gas Co. The following is the portion of the opinion relating to that point:

"Is the Louisville Gas Company liable for damages, conceding that the destruction of plaintiff's goods was caused by the negligence of the persons in charge of the boiler which exploded, which was the corporate property of the Louisville Electric Light Company, upon the admitted fact touching the purchase and absorption by the Louisville Gas Company of the stock and assets of the electric light company?

At common law a corporation had no right to purchase stock in any other corporation, except and unless the purchase was necessary or proper for the accomplishment of the purpose for which the *purchasing* corporation was created. By express provision of its charter, however, the Louisville Gas Company was given power to buy stock in other gas companies. By section 1 of the charter of Louisville, Acts 1889-90, vol. 3, page 128,

this power of the Louisville Gas Company was enlarged, and the gas company was given all the power and authority necessary for the manufacture, distribution and sale of electricity for illumination, and to that end it was authorized and given the power to purchase, hold and sell all real and personal property, including stock in other companies, necessary or convenient for the conduct of such business.

In the exercise of this newly delegated and enlarged power of manufacturing, distributing and selling electricity for illumination, for the purpose of enabling it to conduct such business, the Louisville Gas Company *purchased* all of the stock of the Louisville Electric Light Company, and by its absolute ownership of all the stock and assets of the Louisville Electric Light Company took possession and had the ownership and control of all the plant and machinery which the electric light company had theretofore used for the purpose of generating, distributing and selling electricity for illumination in the city of Louisville. Thereupon all of the original directors of the Louisville Electric Light Company, nine in number, resigned and nine of the directors of the Louisville Gas Company were elected directors of the electric light company. Then the vice-president of the gas company was elected president of the electric light company and the office of the electric light company was changed and removed to the office of the gas company, and one and the same office thenceforth served as the office of both companies. The gas company then became the guarantor upon the mortgage debt of \$32,000 of the electric light company and assumed the payment of its floating debt, amounting to between thirty and forty thousand dollars. Besides this the Louisville Gas Company, having thus bought all of the stock of the electric light company, and assumed its control and management, guaranteed certain contracts which theretofore had been made by the electric light company with certain manufacturers of electric light machinery for the purchase of machinery. The gas company purchased and paid for dynamos to be used by it in the manufacture, distribution and sale of electricity for illumination through and by the use of the machinery and plant of the electric light company. The gas company took the electric light plant and removed it to its new plant and incorporated it with its new large plant at Fourteenth and Magazine streets.

These established and admitted facts demonstrate that it was the purpose of the gas company to use the electric light company, its plant and machinery, as a means and agency for carrying on its enlarged powers of manufacturing, distributing and selling electricity for illumination in the city of Louisville. It is true that it did not formally dissolve the electric light company by surrendering its franchise, as it had a right to do, being the owner of all the stock. If the gas company preserved the corporate autonomy and existence of the electric light company by gratuitously transferring a share of stock to different members of its own directory in order to enable them also to be directors in the electric light company, it is palpable that the purpose of the gas company in so doing was purely and exclusively to enable it to carry out its enlarged power of

manufacturing, distributing and selling electricity in the city of Louisville for illumination, the electric light company being considered by it a necessary and convenient agent for the conduct of its new business under its said enlarged power. The very language of the legislative act itself expressly shows that it was contemplated and intended by the law makers of the act of 1889-'90, above referred to, in enlarging the corporate powers of the gas company from those of a mere manufacturer and seller of gas for illuminating purposes, to that of a manufacturer and seller of electricity for illumination, to confer upon the gas company the right to use other companies as its agents in the manufacture, distribution and sale of electricity, should it deem such other companies necessary or convenient agents for the conduct of its new business under the said enabling act. The amendatory act referred to, after conferring upon the gas company the power to manufacture, sell and distribute electricity for illumination, expressly provides that as a means of exercising said new corporate power of carrying on such new business the gas company might purchase, hold and sell real and personal property, including stock in other companies necessary or convenient to the conduct of such business. Here is express legislative authority to the gas company, to purchase, hold and sell stock in other companies, such as might be necessary or convenient to enable it, the gas company, to carry on the business of manufacturing, distributing and selling electricity for illuminating purposes in the city of Louisville. Nothing could be plainer than the legislative intent here expressly declared to authorize the gas company, by the purchase of stock in other companies, to obtain control of them and use them as its agents in the manufacture, distribution and sale of electricity for illumination. The facts clearly show that the gas company so understood, construed and acted upon the new legislative grant which conferred upon it the power to manufacture, distribute and sell electricity for illumination.

So that it seems to me it is immaterial whether the electric light company's corporate existence was suspended and merged into that of the Louisville Gas Company under the act above referred to, and the said contract of purchase, in pursuance thereof, or whether its corporate existence was maintained; for, in the first instance, the gas company would be immediately liable as a direct principal *tort feasor*; and in the second, it would be liable for the acts of the electric light company as its agent upon the principle of *respondeat superior*. It is manifest that in purchasing the entire stock of the electric light company the gas company was simply adopting what it considered a "convenient and necessary means to the end" of manufacturing, distributing and selling electricity for illuminating purposes in the city of Louisville. To hold that the gas company could adopt the means prescribed by statute and yet repudiate all responsibility for the improper use of those means would be, in the forcible language of distinguished counsel in this case, "a solecism inexcusable under any system of jurisprudence which pretends to the ultimate accomplishment of justice and honest dealings."

There is a marked distinction between the case of *Richmond & Irving Construction Company v. R. N. I. & B. R. R. Co.*, in the Federal Circuit Court of Appeals for this Circuit, referred to in the brief of learned counsel for defendants, and the case at bar. No one will contend, I apprehend, that because the stockholders in two corporations are the same persons and one corporation dominates the other, that the dominating corporation is liable for the torts of the dominated corporation. The identity of the stockholders in two separate corporations does not destroy, suspend or in any wise affect the legal corporate identity of the two, nor does the bare fact that one corporation exercises a controlling influence over another, through the ownership of its stock or the identity of stockholders, operate to make either the agent of the other or merge the two into one. It is equally true that the stockholders of neither corporation are liable for corporate debts or corporate torts of the other, or of either.

For the same reason the case of *Atchison R. R. Co. v. Davis*, 84 Kansas, 209, referred to by learned counsel for the defendants, is not authority for the contention made for the defendant gas company in this action of non-liability for the tort, if such tort exists, on account of negligence of those operating the boiler which exploded and caused the damage complained of. In the case at bar the gas company had the power conferred upon it by statute to manufacture, distribute and sell electricity for illumination, and in order to exercise this power and carry on this business it is authorized by the statute to buy stock in other companies. The statute says:

"And to this end the gas company is authorized and given the power to purchase, hold and sell . . . stock in other companies necessary or convenient to the conduct of such business."

To what end does that statute refer? Why, manifestly, to the end of manufacturing, distributing and selling electricity for illumination. To what business does the statute refer to the necessary and convenient conduct of which the gas company is given the power of purchasing stock in other companies? Clearly to the business of manufacturing, distributing and selling electricity for illumination. Here we have the statute itself authorizing the gas company by purchasing stock in other companies, to make them its instrumentalities and agencies for carrying on the business which the statute authorized it to carry on. And in sustaining this proposition, dictated by the reason and common sense of the statute, it can not be said that the principle of law that stockholders are not liable for the torts of the corporation, is infringed. In *Louisville Banking Company v. Eisenman*, 94 Kentucky, our Court of Appeals said: "While we recognize the general rule on the subject sustained by the authority referred to, it must be held that the purchase by one of all the shares in a corporation under a statute is a dissolution of the corporation to the extent that it suspends the exercise of the rights under the franchise until the owner transfers the stock in good faith, so as to maintain an organization under the statute. The Louisville Gas Company purchased all the stock, as we have seen, in the electric light company and is to-day

the owner of all of its stock; and in doing this it purchased its franchise, plant and machinery, and consolidated it with its own, united the offices in one, removed the plant, and incorporated it with its own, and the only transfer of stock which it has made, as far as the record discloses, is the voluntary gratuitous transfer of one share of stock each to certain directors of its own in order to make them eligible as directors in the electric light company. Under the last decision above referred to, the electric light company as a corporation is dissolved to the extent that its power to exercise its rights under its franchise is *suspended* until and except the owner has transferred the stock in good faith so as to maintain the organization under the statute. The gratuitous transfer of stock by the gas company to members of its own directory in order to make them eligible as directors in the electric light company, which belongs to the gas company, is manifestly not such a transfer of stock as Judge Pryor referred to and had in mind as being necessary to maintain the organization under the statute. But even if the organization of the electric light company is maintained under the statute, then under the statute enlarging the powers of the gas company and enabling it to buy the stock of the electric light company in order to carry on its new business of manufacturing, distributing and selling electricity for illumination, the undisputed facts show that the Louisville Gas Company itself is carrying on the business under the statute referred to of manufacturing, distributing and selling electricity for illumination, and that it is accomplishing this end by and through the means and agency of the electric light company which it owns. I do not for a moment consider or hold that the Louisville Gas Company in purchasing the stock of the Louisville Electric Light Company in order to use that company and its machinery as a means to the end of manufacturing, distributing and selling electricity for illumination in accordance with the power conferred upon it by the act referred to, has committed any fraud upon the public, or is guilty in the least of any bad faith. It has done nothing but what it had the statutory and moral right to do, to-wit, to buy the stock of another company in order to enable it to carry on the new business of manufacturing, distributing and selling electricity for illumination in the city of Louisville. As an independent corporation, solely responsible for its torts while being thus used, the electric light company has no legal existence. It is either merged or suspended as to its corporate existence by reason of the gas company owning it "*body and soul*," or it is a mere agent of the gas company in manufacturing, distributing and selling electricity; and if those theoretically the servants or employees of the electric light company in the line of the general business of the gas company conducted by it should commit a tort, the law will hold the principal responsible according to the very right and in despite of the legal fiction of a separate artificial existence of the electric light company. The Louisville Gas Company, since it purchased and became the owner of all the stock of the electric light company, its plant, machinery and franchise, since it took

control and management of the same for the purpose of manufacturing, distributing and selling electricity for illumination to the citizens of Louisville, has been held out to and been regarded by the public to be, as indeed it is in fact, the principal and owner in the manufacture, distribution and sale of electricity for illuminating purposes by the use of the plant and machinery which formerly belonged to the electric light company; and the law will hold it to maintain the truth of the situation, and estop it from using the fictitious theoretic existence of the electric light company as a shield and defense against liability for the torts committed by employes in its business. See *York & Maryland Line Railroad Co. v. Ross Winans*, 17 Howard, p. 30.

From the foregoing it follows if the electric light company's corporate existence is suspended, the gas company is directly liable, if liability there be, for the explosion of the boiler in question; if the electric light company's existence is not suspended, but it exists as a corporation, then upon the facts heretofore stated at length, it is and was the agent for the Louisville gas company, which is liable for its torts.

WESTERN UNION TELEGRAPH COMPANY, Plaintiff in Error,
v. EDWARD McMULLEN, Defendant in Error.

New Jersey Court of Errors and Appeals, Nov. 19, 1895.

(58 N. J. 155.)

INJURY TO LINEMAN BY SHOCK.

(Head-note in part by the court):

A servant assumes the ordinary risks incident to his employment, and also risks arising in consequence of special features of danger known to him, or which he could have discovered by the exercise of reasonable care, or which should have been observed by one ordinarily skilled in the employment in which he engages.

The employer is bound to use reasonable care to protect the servant from unnecessary risk, and is liable for damages occasioned to him through some latent danger of which he should have warned him.

The above instructions held to have been properly given the jury in an action for damages for injuries to a lineman of a telegraph company, by shock, in which it appeared that the ordinary telegraph current was insufficient to injure persons handling the wires; that electric light wires were attached to telegraph poles near the one where plaintiff was injured, so near the telegraph wires as to be dangerous, of which plaintiff, a new employe, had no warning from the company; and judgment for plaintiff sustained.

APPEAL by defendant from judgment of Circuit Court, Essex county.

William P. Douglass and Rush Taggart, for plaintiff in error.

Samuel Kalisch, for defendant in error.

The opinion of the Court was delivered by

VAN SYCKEL, J.: In June, 1893, McMullen, who was plaintiff below, was in the employment of the Western Union Telegraph Company, engaged in helping to set poles, string wires, put up cross arms, and connect wires. While in the performance of his duty, and as he was about to attach a new wire, he received such a strong current of electricity from the Western Union wire that he was knocked insensible, and received most painful injuries.

The writ of error in this case is prosecuted to review the judgment recovered by McMullen below in compensation for the injuries received by him.

The pole upon which McMullen was working at the time he was injured was the property of the telegraph company. It appeared in the case that, in the ordinary use of the telegraph wires, the current of electricity was not sufficient to do injury to the person handling the wires.

It further appeared that in various parts of Jersey City, and not far from where McMullen was injured, there were poles of the telegraph company to which were attached electric light wires, heavily and dangerously charged with electricity, and that such electric light wires were in such close proximity to the wires of the telegraph company as to be dangerous, but no electric light wire was attached to the pole on which McMullen was injured. He had been in the employ of the company but one month and five days

when he was injured, and had never worked in Jersey City before.

It did not appear that the company gave any warning to McMullen of the danger in stringing its wires by reason of their close proximity to electric light wires at other points.

The trial court charged the jury that McMullen, when he entered the service of the company, assumed the ordinary risks incident to the employment, and he also assumed risks arising in consequence of special features of danger known to him, or which he could have discovered by the exercise of reasonable care. He left it to the jury to say whether the placing of electric light wires upon some of the poles of the company, near to the telegraph wires, was a special feature of danger known to McMullen, or which should have been observed by one ordinarily skilled in the employment in which he was engaged. If the jury found in favor of McMullen upon these questions, then it was instructed to inquire whether the company had been guilty of actionable negligence. On this part of the case the jury was instructed that the duty imposed on the company by the contract of hiring was not to subject McMullen, without his knowledge or consent, to risks not assumed by him; that an employer contracts with his employe to use reasonable care to protect him from unnecessary risks, and is responsible to the employe for damages resulting to him by reason of the want of such care. The jury was directed to charge the company with negligence if it found that McMullen was injured through some latent danger, of which he should have been warned, and that the injury resulted from the fact that the electric light wires placed on the poles of the company were the proximate cause of the injury.

All these instructions are in accordance with the established rule in this State. *Foley v. Jersey City Electric*

Light Co., 25 Vroom. 411 ; *Newman v. Fowler*, 8 id. 89 ; *Steamship Company v. Ingebregsten*, 28 id. 400.

Upon each and every of the controlling questions in the case there was sufficient evidence to go to the jury, and, therefore, there is no error in law in the trial below. The judgment should be affirmed.

For affirmance—The CHANCELLOR, Chief Justice, GARRISON, GUMMERE, LIPPINCOTT, LUDLOW, VAN SYCKEL, BOGART, BROWN, SIMS, SMITH, TALMAN, 12.

For reversal—NONE.

NOTE—See note to *Lundquist v. Duluth St. Ry. Co.*, *post*.

NETTIE M. STILLMAN, AS ADM'X, ETC., OF ARTHUR B. STILLMAN, DECEASED, Appellant, v. BRUSH ELECTRIC LIGHT COMPANY OF ROCHESTER, Respondent.

New York Supreme Court, General Term, Fifth Dept., Dec., 1895.

(92 Hun, 504.)

INJURY BY SHOCK TO EMPLOYE OF ELECTRIC LIGHT COMPANY — BILL OF PARTICULARS.

In an action brought by the administratrix of a person employed as a trimmer of lamps by an electric light company, to recover damages for his death by electric shock alleged to have been caused by defendant's negligence, first, in failing to employ certain improved appliances in general use and necessary for the safety of electric lamp trimmers ; and second, in the respect that the lamp was defectively constructed and negligently maintained—*held*, that the plaintiff was properly required to furnish a bill of particulars as to the first branch, but not as to the second, which was peculiarly within the knowledge of defendant.

APPEAL by plaintiff from order of Special Term, directing plaintiff to furnish a bill of particulars.

Facts stated in opinion.

Peter H. Van Auken, for the appellant.

George F. Yeoman, for the respondent.

WARD, J. : The plaintiff in her complaint alleges that on March 10, 1893, the defendant was the owner of certain real estate, buildings, machines, dynamos, wires and other appliances used in the generation and supplying of electricity for the city of Rochester; that the defendant negligently maintained as a part of its said plant for electric lighting purposes a certain lamp in the store of Garson, Myer & Co. of an imperfect and obsolete design and construction, and which did not have thereon certain improved appliances and attachments, which at said date, and long prior thereto, were and had been in general use in other cities in this country, and which were necessary at all times therein mentioned for the safety of persons who, in the exercise of reasonable and ordinary care, had occasion to handle said lamp and to repair and trim the same; that defendant negligently maintained said lamp with a defective switch and other wires defectively constructed, and in close proximity to certain gas jets and lines of metal pipe without having in, upon and around said lamp and its connecting line of wire adequate and proper insulation and protection; that the defendant negligently maintained upon its said line of wire and circuit connected with said lamp in the store of Garson, Myer & Co. a large number of arc lamps for electric lighting purposes which require the transmission of an electric current of great strength and intensity and dangerous to human life; that the defendant at all times therein mentioned negligently maintained the same without providing wire properly insulated for the transmission of said current, and negligently maintained said line and transmitted said current of electricity over a wire, the insulating covering of which was old, worn, torn and imperfect and useless for the purpose of insulation. The complaint also

charged the defendant with negligence in not inspecting the lines of wire in question to see whether they were properly insulated or whether the current upon said line had become grounded.

The complaint further alleged that on the day aforesaid the plaintiff's intestate, Arthur B. Stillman, who was employed by the defendant as a trimmer of lamps, in preparing and trimming a defective lamp in the store of Garson, Myer & Co. in the proper discharge of his duties, was killed by a current of electricity without fault on his part and by reason of the negligence of the defendant aforesaid, and the plaintiff brings this action to recover damages for such killing.

The Special Term, upon the application of the defendant, ordered the plaintiff to deliver to the defendant's attorneys "a bill of particulars of the plaintiff's claim, duly verified, stating what improved appliances and attachments in general use at the date of the death of the said Arthur B. Stillman, referred to in the complaint, were not upon the lamp in the store of Myer, Garson & Company, referred to therein, and in what respect said lamp was negligently maintained, and in what respect the said lamp was defectively constructed, and where the ground upon the circuit upon said line mentioned in the complaint was located, or in what manner it was related to the death of said Stillman, and that the plaintiff be precluded from giving any evidence in respect to such matters upon the trial other than as specified in said bill of particulars."

The appeal from this order brings the question before us. The complaint and the answer of the defendant (which denied its negligence and its liability), and the affidavit of George W. Archer, the president of the defendant, in which he alleged that the defendant was ignorant of the negligence complained of, and of the defects complained of, and their character, and had no knowledge of what improved

appliances or attachments were not upon the lamp, or of any ground upon said circuit or line at said time, were the papers upon which the defendant moved for the order stated. These were met on behalf of the plaintiff with the affidavit of William A. Breese, a practical electrician who was familiar with the machinery and system of the defendant, in which he stated that the defendant was able to detect any grounds by simple tests well known to electricians and to determine within a short distance the location of said grounds, and that after determining by tests the presence of a ground and its approximate location, it required but a short time to locate the exact point of a ground by sending men over the circuit; also, with the plaintiff's affidavit, in which she stated positively that she was unable to give any further particulars in regard to the cause of the accident by which her husband met his death, and the particular acts of negligence of the defendant in relation thereto, than her complaint stated; and she made a part of her affidavit the testimony taken upon a coroner's inquest held upon the body of her husband to ascertain the cause of his death, on which the foreman of the defendant was called as a witness, and claimed that his evidence indicated such a knowledge of the situation and circumstances causing the death as would show that the defendant should know the facts sought to be obtained by the bill of particulars, and the appellant's contention here is that she should not be required to furnish any of the particulars required by the order.

We are of the opinion that the first branch of the order, requiring the plaintiff to state what improved appliances and attachments were in general use at the time of the death of the intestate, that were not upon the lamp in question, should be sustained. If the plaintiff had in mind or could ascertain any such improvements of which the defendant claims to be ignorant, it is proper that she

should state them so that the defendant may be apprised of the particular improvements claimed.

As to the other branch of the order, requiring specifications as to wherein the negligence of the defendant consisted with regard to the lamp in question and its connection, there is more difficulty.

The defendant cites, as sustaining its contention in this regard, *O'Hara v. Ehrich*, 19 Civ. Pro. Rep. 72, where the General Term of the Superior Court of New York held that the plaintiff should give the particulars of the negligence of the defendant under the general statement in the complaint that the injury was caused by the negligent and improper construction, management and operation of an elevator; and the case of *Lahey v. Kortright*, 13 Civ. Pro. Rep. 352, where the same court held that in an action to recover damages, for an alleged defect in the title to premises sold, the court required a bill of particulars showing wherein the title was defective, and citing also *Keairns v. Coney Island & B. R. Co.*, 1 N. Y. Supp. 906, where a driver of one of defendant's cars alleged that he was injured through the defendant's negligence by being thrown from a car which was "out of repair and in an unsafe condition," and the complaint specified in what respect the car was out of repair and unsafe to a certain extent. The court held that if the plaintiff sought to prove particulars not alleged under his general allegation of negligence, he must give as to such a bill of particulars.

In *McCarthy v. Lehigh Valley R. R. Company*, 27 N. Y. Supp. 295, also cited by the defendant, the Special Term of the Superior Court of Buffalo, in an action for wrongfully causing the death of one of the defendant's employes, a brakeman, in which the complaint alleged the ground of action in a very general statement that defendant negligently operated its trains of cars through incompetent servants and under insufficient rules and with unsafe appliances and over defective tracks, held that the plaintiff

iff should give particulars as to the train on which the deceased was killed, when killed, where the track was defective, what rules were insufficient and in what respect the defendant was negligent in operating its train.

It will be seen that these cases are based substantially upon bald allegations of negligence without specifications as to the particular negligence of the defendant, and in cases where the plaintiff would be expected to know or upon reasonable inquiry could ascertain the particulars.

In the case before us the plaintiff, in her complaint, has been much more specific and has amplified her general charge of negligence with several important particulars; further than that she is unable to go, and insists that the defendant is much better able to state the facts sought by the bill of particulars from its knowledge of the situation than she possibly can be. The plaintiff's claim is that the deceased met with his death from the use by the defendant of that wonderful and mysterious power which in the last few years has been utilized and harnessed in, to the uses of business and the purposes of society. To one inexperienced in the manner of making this force available it is like a sealed book, and only those who have made a business of studying and using electricity can understand its operations or its dangers. It seems absurd then for the defendant, who is so much better equipped and better informed on the subject, to require this information from the plaintiff.

In *Donohue v. Meares*, 19 N. Y. Supp. 585, where an administrator sought to recover damages for the death of his intestate, who was burned to death while engaged as an employe in the defendant's hotel, and the only allegation of negligence consisted in this: that the defendants did not provide a reasonably suitable or safe place for the deceased to sleep in and the "want of care of said defendants . . . in failing to provide reasonably safe means of egress in case of fire or accident in and about said

buildings and premises," the defendants moved for a bill of particulars as to these general allegations, which was denied, and Judge O'BRIEN, in speaking for the court (General Term of the First Department), said: "While the power of the court to order bills of particulars extends to all descriptions of actions, we think that caution should be exercised in requiring bills of particulars in actions for negligence, and particularly where the action is brought, not by the person injured, but, as here, by *one claiming in a representative capacity*. Where the negligence alleged results in death and the action is brought by an administrator, the latter ordinarily is obliged to obtain his evidence and facts from sources other than his own personal knowledge, and a defendant is ordinarily in possession of facts bearing upon the cause of death charged through his negligence. No rule can be formulated with respect to any class of cases, much less with respect to actions of negligence, as to when a bill of particulars will be required, it being necessary to determine upon the facts presented upon the application in each case whether it should be granted or denied."

We adopt these views and they seem exceedingly appropriate to the case at bar.

We have reached the conclusion that the order of the Special Term should be modified so as only to require the plaintiff to deliver to the attorneys for the defendant within twenty days from the service of this modified order and a notice of its entry, a bill of particulars, duly verified, stating what approved appliances and attachments in general use at the date of the death of Arthur B. Stillman were not upon the lamp in the store of Garson, Myer & Co., referred to in the complaint herein, and that the other portion of the order of the Special Term be reversed, but without costs of this appeal to either party.

LEWIS and BRADLEY, JJ., concurred.

Order modified so as to require bill of particulars of

McAdam v. Railway and Electric Co.

what approved appliances were in use at the death of the intestate, and in other respects the order affirmed, without costs.

NOTE—See note to *Lundquist v. Duluth St. Ry. Co.*, *post*.

HUGH A. McADAM v. CENTRAL RAILWAY AND ELECTRIC COMPANY.

Connecticut Supreme Court of Errors, March 26, 1896.

(67 Conn. 445.)

DUTY OF ELECTRIC COMPANY TO EMPLOYEES.

When the Legislature authorizes a corporation to use an agency of great danger to life, as electricity, and to use an uninsulated trolley wire, which is capable of communicating its deadly quality to any wire or conductor of electricity that may come in contact with it, the law implies a duty of using a very high degree of care in the construction and operation of the appliances for the use of that agency, and holds it accountable for injury to any person due to the neglect of that duty, whether the person injured be its employe or not.

Accordingly *held*, that defendant was properly held liable for injury to its lineman, due to shock communicated to him from a trolley wire by an uninsulated span wire.

Held, also, that the question of contributory negligence was properly submitted to the jury.

APPEAL by defendant below from judgment of Superior Court, Hartford county. Facts stated in opinion.

Frank L. Hungerford, for appellant (defendant).

John P. Healy and *Frank E. Healy*, for appellee (plaintiff).

HAMERSLEY, J.: The defendant corporation maintained in the city of New Britain an electrical plant, with two

separate branches, one for operating an electric street railway under the overhead trolley plan, and the other for furnishing electric lights. The plaintiff was a lineman employed in the electric light department. It was a part of his duty, when specially directed, to make some changes in the lines of the railway department. He had been specially directed to ascend a pole used in connection with the railway, for the purpose of removing a telephone wire fastened to the top of the pole, and used by the defendant. Attached to this pole were span wires and support wires belonging to the railway plant. The span wires passed over the main trolley wire, and might become dangerous by contact with that wire, unless protected by artificial insulation. In the construction of the railway the wires were so arranged that occasional contact between the span wires and the trolley wire was likely to occur. The span wires were understood to be insulated from the main trolley wire by proper artificial insulation. Pursuant to his directions, the plaintiff ascended the pole by a ladder to the height of about sixteen feet, with the expectation of climbing from that point to the top of the pole. Before leaving the ladder, and for the purpose of steadying himself as he was about to ascend, he took hold with his left hand of an eyebolt connected with a support wire which ran from the pole to the next pole, and reached his right hand to take hold of an eyebolt to which was fastened a span wire. The support wire in some way made a ground connection. The span wire was not insulated, and was in contact with the trolley wire charged for use for railway purposes. As his right hand touched the eyebolt, he received a severe shock, which caused him to fall to the ground, whereby he was injured. Several days prior to the accident the defendant had its attention called to a dangerous condition of the wires at this point, and it made no effort to discover the cause.

The court below found that the defendant was guilty of

gross negligence, and that the plaintiff was not guilty of contributory negligence, and gave judgment for the plaintiff to recover substantial damages.

The reasons of appeal seem to be a summary of the defendant's argument upon the trial, and apparently the errors mainly relied on are the alleged erroneous conclusions reached by the court upon questions of fact. In its brief, however, the defendant claims that, in finding gross negligence in the construction of the defendant's wires, the court erred in measuring the legal duty of the defendant by an erroneous standard. The trolley wire, as used by the defendant, is charged with an agency of exceeding danger to life, and is capable of communicating such deadly quality to any wire or conductor of electricity that may come in contact with it. When the Legislature authorizes a corporation to use such an agency in the public streets, the law implies a duty of using a very high degree of care in the construction and operation of the appliances for the use of that agency, requiring the corporation to employ every reasonable precaution known to those possessed of the knowledge and skill requisite for the safe treatment of such an agency, for providing against all dangers incident to its use, and holds it accountable for the injury to any person due to the negligence of that duty, whether the person injured is or is not one of its own employees. This standard of duty was correctly applied to the facts as found by the court below. The method of construction in connection with the failure to insulate the span wire was a violation of the duty imposed on the defendant by law.

The defendant also claims in its brief that the court did not hold the plaintiff up to the degree of care fixed by law for persons engaged in hazardous undertakings. In so far as this claim implies that the court, while applying the legal standard of care for persons engaged in dangerous undertakings, erred in its finding, from all the circum-

stances of this case, that the plaintiff in fact did not neglect to use such care, it does not present a question which this court should review; and, if it were open to review, the facts as detailed in the record, would compel us to reach the same conclusion; in so far as the claim implies that the court did not recognize nor apply to the facts as found the legal standard of care, it is not consistent with the record—the court made no ruling adverse to the defendant in respect to the standard of care required by law.

The finding gives a minute and clear recital of the circumstances of the accident. The conclusion of the court that the defendant was guilty of negligence was demanded by its plain violation of a legal duty; and the finding shows that the conclusion that the plaintiff was not guilty of contributory negligence was an inference from the special facts and circumstances peculiar to this case as found by the court from the evidence, and it does not appear from the finding, and is not assigned as error in the reasons of appeal, that in drawing such inference the court violated any rule or principle of law applicable to the facts as found. Such a conclusion cannot be reviewed in error; discussion of this point is barred by many recent decisions of this court.

There is no error in the judgment of the Superior Court.
In this opinion the other judges concurred

NOTE—See note to *Lundquist v. Duluth St. Ry. Co.*, *post*.

LINCOLN STREET RAILWAY COMPANY v. CHARLES R. COX.

Nebraska Supreme Court, June 3, 1896.

(48 Neb. 807.)

**ELECTRIC STREET RAILWAY—DEFECTIVE APPLIANCES—INJURY TO EMPLOYEE
BY SHOCK.**

In an action for damages for injuries by burning and shock, caused to an employe of an electric street railway by contact with fire alarm telegraph wire which had fallen upon a trolley wire and become charged therefrom, *held*, that instructions to a jury were erroneous, in that they taught that the verdict must depend upon the fact of danger in the manner in which the trolley wires were constructed and maintained, rather than upon negligence of the company in so constructing and maintaining them.

Duty of master to servant, with respect to defective appliances, stated.

APPEAL by defendant below from judgment of District Court, Lancaster county. Facts stated in opinion.

William G. Clark, for plaintiff in error.

Lamb, Adams & Scott, *contra*.

IRVINE, C.: Cox, a minor, by his next friend, brought this action against the Lincoln Street Railway Company to recover for personal injuries sustained by him while in the employ of the railway company. He recovered a judgment for \$800. Cox was employed in driving a team which drew what is called a "tower wagon," being a wagon bearing a scaffold used for the purpose of repairing the trolley wires by means of which the defendant's electric railway was operated. At a point near the intersection of Seventeenth and South streets, a fire alarm wire passed above the trolley wire, crossing it at an angle of forty-

five degrees, and placed about fourteen inches above the trolley wire at the point of crossing. The evidence tends to show that the fire alarm wire was so located before the trolley wire was erected. Three co-employees of Cox were engaged in repairing the wires. In some manner, while their work was progressing, the fire alarm wire fell across the trolley wire, and thence to the ground, where it came in contact with Cox, injuring him by burning and electric shock. The negligence alleged in the petition was in the construction of the trolley wire in dangerous proximity to the fire alarm wire, and in permitting them to come in contact. On the latter branch of the case, the court instructed the jury that, if the contact was brought about by the negligence of any of Cox's companions in the work, there could be no recovery, as these men were his fellow servants. This feature was therefore eliminated from the case and the verdict must have been based upon the construction and maintenance of the trolley wire dangerously near the fire alarm wire. On this branch of the case the court gave the following instructions:

"(8) If you find, from the evidence, that, at the point where the alleged injury occurred, there had been erected across the street a fire alarm wire, and that, after said fire alarm wire had been erected, a trolley wire was erected along said street at said point, and thereafter the defendant took possession of said trolley wire, and when the defendant so took possession of said trolley wire it was in such close proximity to said alarm wire as that the said two wires were liable to come or be thrown together, or in contact with each other, and while said defendant was in possession of said trolley wire it was charged with electricity, and the defendant so used and operated the same so charged, and negligently or carelessly permitted or caused the said two wires thus charged with electricity to come in contact with each other, and thereby one of them was

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burned in two, and fell to the ground, and without the fault of plaintiff struck him, and injured him, then the defendant would be liable for such injury."

"(10) It is the duty of a party or corporation maintaining and operating an electric railway to see that its trolley wire is reasonably safe and sound, and of sufficient distance from other electric wires as that the use to which said party or corporation puts it will not endanger the lives of persons generally, or the servants of the party or corporation so operating it.

"(11) If you find, from the evidence, that, at or near the point where the accident occurred, the fire alarm wire had been erected before the trolley wire, and the trolley wire was, when erected, placed in such close proximity to the fire alarm wire as to be dangerous, and you also find that, at the time of the injury to plaintiff, the employes of the defendant were at work about the wire near said point, and were doing work in the line of their duty as such employes, and were doing such work in the only way it could be done, and by doing said work said wires were brought or came in contact with each other, and without fault or negligence of the plaintiff, caused the injury complained of, then defendant would be liable."

In giving these instructions, especially as they were not accompanied by any instruction stating to the jury the rule of care devolving upon the defendant, we think the court erred.

The effect of these instructions upon the minds of the jury must have been to make their verdict depend upon the fact of danger in the manner in which the wires were constructed and maintained, and not upon negligence on the part of the railway company in so maintaining and constructing them. The accident undoubtedly happened, and the jury found that it was not due to the negligence of the men at work about the wires. The fact of the accident, therefore, established the fact of danger; and the

instructions were equivalent to telling the jury that a verdict might be based upon the fact of the injury, without proof of negligence. This was erroneous. *Missouri P. R. Co. v. Lewis*, 24 Neb. 848; *Chicago, B. & Q. B. Co. v. Howard*, 45 Neb. 570. We recognize the fact that there appears in the instructions we have quoted some language seeming to qualify this statement. For instance, in the eighth instruction, it seems to have been stated that there must be a finding that the defendant negligently and carelessly permitted or caused the wires to come in contact. But these adverbs refer to the conduct of the company or its servants in handling the wires, and are not used in connection with those parts of the instruction which relate to the erection and maintenance of the wires. Moreover, negligence and due care having been nowhere defined in the charge, the jury was left without means of properly applying the adverbs. Again, in the tenth instruction, the duty of the company was stated, "to see that its trolley wire is reasonably safe and sound, and of sufficient distance from other wires as that . . . it will not endanger the lives of persons." To a legal mind the word "reasonably" might, perhaps, imply the element of care. But we must deal with the instructions in the sense in which they would be understood by the jury. Notwithstanding these qualifying words, we think it quite clear, as already stated, that the instructions made the case turn upon the fact of danger and not the fact of negligence. A master does not insure his servants against defective appliances. He is not chargeable in all events because the appliances furnished his employes are defective. He is liable only when he has been negligent in the matter. The rule is that, as to his servants, he is bound to use such care as the circumstances reasonably demand to see that the appliances furnished are reasonably safe for use, and that they are afterwards maintained in such reasonably safe condition. He is not liable for defects of which he has

no notice, unless the exercise of ordinary care would have resulted in notice. *Sioux City P. R. Co. v. Finlayson*, 16 Neb. 578; *Missouri P. R. Co. v. Lewis*, *supra*; *Union P. R. Co. v. Broderick*, 30 Neb. 735—all recognize this rule. In *Hammond v. Johnson*, 38 Neb. 244, it is said that it is the duty of a master to furnish, for the use of his servant, in the course of his employment, proper and safe appliances and instruments for the performance of the services required; but this language is used in such a connection that no intimation could reasonably be drawn from it that the duty is absolute. On the contrary, it clearly appears that it is only for negligence in failing to perform the duty that a liability exists. A peculiar rule is stated in *Lehigh v. Omaha Street Co.*, 36 Neb. 131. This is as follows: "It is a fundamental rule of law that the master is to furnish his servants with such appliances for his work as are suitable and may be used with safety, and, if the servant is injured by reason of defective appliances placed in his hands by the master or his agent, the master will be liable, unless he can clearly show that he has used due care in the selection of the same." It would seem, from this, that the plaintiff's case would be made out on proving that he was injured through a defect in the machinery, and that the burden would then devolve upon the master, not only to show by a preponderance of the evidence, but to "clearly show," that he had used due care. We do not think that it was the intention of the writer of the opinion to convey such an impression; because every one of the ten cases he cites in support of the rule is to the effect that the master is not absolutely responsible for defects, but liable only where he has failed to exercise due care in the premises, and that the plaintiff must plead and prove such want of care.

Reversed and remanded.

Note—See note to *Lundquist v. Duluth St. Ry. Co.*, *post*.

MEDORA A. HARROUN and ALBERT O. FENN, AS ADMINISTRATORS, ETC., OF FRED J. HARROUN, DECEASED, Respondents, v. THE BRUSH ELECTRIC LIGHT COMPANY, Appellant.

New York Supreme Court, Appellate Division, Fourth Dept., Dec., 1896.

(12 App. Div. 126.)

INJURY TO EMPLOYE BY ELECTRIC SHOCK.

In action for death of employe of electric light company by shock alleged to have been due to defective insulation, facts held sufficient to warrant submission to jury of question of defendant's negligence.

Failure to wear rubber gloves while trimming electric lamps in day time, held, no evidence of contributory negligence.

Proper to prove condition of insulation of electric wires three days after the accident in question, it appearing that the condition was the same then as at the time of and before the accident.

Improper to show that no accident had happened before on the same wires without proving that their condition remained unchanged.

The degree of care required of a master to furnish his servant with safe appliances is measured by the danger of the forces employed.

APPEAL by defendant from judgment of Supreme Court, Monroe county, entered upon the verdict of a jury, and from order denying motion for new trial upon the minutes. Facts stated in opinion.

Joseph W. Taylor, for the appellant.

Charles Roe, for the respondents.

FOLLETT, J.: This action was begun January 7, 1895, to recover damages occasioned by the death of the plaintiff's intestate, caused, it is alleged, by the negligence of the defendant.

In 1894 the defendant was engaged in lighting by electricity the streets, dwellings and places of business in

the city of Rochester, and in supplying electrical power. For two years before his death, which occurred September 11, 1894, Fred J. Harroun, plaintiff's intestate, had been employed as a lamp trimmer. About fifteen minutes after seven o'clock in the morning of Tuesday, September 11, 1894, while engaged in trimming a Brush street lamp at Wolff park, he was killed by an electric shock. No person saw the accident. This lamp, when burning, was held in position by a wire cable, called a tail guy, extending from the lamp to the pole to which it was secured by a padlock. To trim the lamp it was usual to unlock the tail guy and lower the lamp part way to the ground so that it could be reached when the trimmer was standing on a short ladder. This lamp was on circuit or wire No. 12 for lighting the streets. On the same arm and pole was a wire known as circuit No. 18 for the transmission of power, and which is called "power wire." These wires were from twelve to eighteen inches apart. The evening before the accident a current of electricity was turned on to No. 12 at seven o'clock and fifty-five minutes, and on the morning of the accident it was turned off at five o'clock and five minutes, and on this morning the current was turned on to No. 18 at seven o'clock, and the custom was to turn it off at midnight. Between five o'clock and five minutes A. M. and seven o'clock and fifty-five minutes P. M., No. 12 was, in electrical parlance, "dead," and No. 18 between seven A. M. and midnight was "alive."

The plaintiff's intestate was found lying on the ground grasping the iron frame of the lamp with his left hand, which was burned to the bone by the current, which caused his death.

Whether the intestate took hold of the frame of the lamp with his left hand for the purpose of trimming it, received the shock and fell, carrying down the lamp and breaking the tail guy, or whether the tail guy broke when he

attempted to lower the lamp and he seized the lamp to prevent it from falling, and so received the shock and fell to the ground with the lamp, is not known.

The evidence establishes, beyond doubt, that wires Nos. 12 and 18 were crossed a short distance from the scene of the accident, and No. 18 was in contact with the tin cornice of a building on State street where the insulation of No. 18 was worn off, and so "a ground" was formed.

It is conceded that the current which killed the intestate was communicated through the iron frame of the lamp. It was established that if this frame had been at the time properly insulated the current could not have been communicated to and through it to the intestate. The plaintiffs insisted that the lamp frame was defectively insulated. The defendant insisted that the frame was properly insulated, but that a sparrow had built a nest on the lamp frame near the wire communicating with the lamp, which was saturated with moisture and formed a conductor between the wire and the frame of the lamp, and that it was the duty of the intestate to keep the lamps free from birds' nests, and that by his failure to do this he contributed by his negligence to the accident. This issue was sharply contested before the jury and evidence given which would support a finding for or against the defendant.

It was also shown beyond dispute that the defendant's wires were carried through trees, with the limbs of which the wires were sometimes in contact, and that the swaying of the limbs crossed the wires on many occasions. It was also shown that the insulation on the wires, where they passed through trees, was worn off so that when a dead wire was in contact with a live wire, and there was a ground, the electrical current was communicated to the dead one. It was also shown that wire No. 12 had been in use for ten years and wire No. 18 for five or six years, and that weather proof insulation on such wires ceases to

insulate effectually after eight or ten years. It was also shown that the wires were crossed at this place between three and four o'clock in the evening of the day before, and while in contact they emitted light, and that the heat burned away the insulation. There was considerable evidence that at different points, on wires Nos. 12 and 18, the insulation had from one cause and another worn off so that the wires were not effectually insulated.

An electrical engineer, Mr. Putman, who examined this lamp on the 14th of September, 1894, the third day after the accident, testified that the carbons were in contact with the shadeholder, which was not insulated from the frame of the lamp, and that there was nothing to prevent a current of electricity from passing from the carbons through the shadeholder and into the frame of the lamp. He testified in the most positive terms that the lamp was imperfectly constructed, the defect being the ability to cross the shadeholder with the carbons. He testified: "With the insulation of the lamp as I found it, under some conditions, I should say, the current would be communicated into the frame with sufficient force to kill a man who took hold of it. If the man did not take hold of the frame at all, the current would surely go right on through the wire. If he took hold of the frame and formed a ground by standing on the ground, under certain conditions he might form a short circuit, and the current could go through him. If the insulation of the lamp was proper, the current of electricity could not get away from the wire and into the frame."

Defendant's foreman testified: "If it (the lamp) was properly insulated, the frame would be harmless to handle." The theory of the defendant, that the electrical current was communicated to the lamp frame through the bird's nest, being discarded by the jury, the theory of the plaintiffs, that the lamp was defectively insulated, is justified by the evidence.

Other evidence was given tending to show that the insulation of these wires had been worn away in various places, and that the wires were so run through trees that they were frequently crossed. Other evidence was given tending to show that this lamp was defectively insulated, but enough has been quoted to show that a question of fact was presented for the jury to determine whether the defendant was negligent in the care of its line and lamps, and the verdict of the jury should be sustained. There was no evidence that the negligence of the intestate contributed to the accident. The negligence alleged is that he did not wear rubber gloves when trimming the lamps, and did not clear away the bird's nest. All the evidence is to the effect that gloves are not worn when trimming lamps on dead wires, but are used in the night time on live wires. The defendant's witnesses testified to this, and also to the further fact that it would be impossible for a trimmer to do the amount of work required of him if he used gloves.

It is urged that the court erred in permitting a witness to testify to the condition in which he found the wires three days subsequent to the accident. It was proved that the wires were then in the same condition that they were at the time of the accident, and before, and the evidence of the witness was simply to the effect that the insulation was worn away in many places, which was not controverted by the defendant.

The defendant asked its foreman: "Did you have any trouble which resulted in an accident on circuit 12 or 18 before the accident to Harroun?" This was objected to as immaterial, the objection was sustained, and an exception taken, and the ruling is urged as an error. Subsequently, the same witness was permitted to testify: "Before this accident no report was made to me of any trouble in the insulation of the wires on Jay street on circuits 18 or 12. If there was trouble, I am the person to whom it would be

reported." Besides, it was not competent for the defendant to prove that no accident had happened before on these wires without showing that the same conditions existed.

Two exceptions taken to the charge of the court are argued. The court charged: "Then, in cases like this, where the action is between employer and employe, two other rules apply, which have no place in a case between a corporation and an outsider not connected with it. The first of those two rules is that it is the duty of the employer to furnish safe machinery, tools, appliances and a safe place in and with which the employe may work. In this case, so far as that question applies, we have to deal wholly with appliances. The question of place does not enter into our consideration. All of this work which the deceased was required to do, was done out of doors, and the question, so far as the duty of the employer is concerned, related wholly to the question of appliance. The law requires not that degree of diligence and foresight which is required of an insurer, or which the law might require of a corporation towards the public, but simply reasonable care and prudence in the selection of safe and suitable appliances for the use of employes. You will readily apprehend that this term, reasonable care and prudence, is, however, a relative one, to be determined by the nature of the thing which is required of the employer. So that what would be sufficient care and foresight in one case would, perhaps, be utterly inadequate in another, and I think it may fairly be said that, while in a general way the law requires simply reasonable care and foresight by the employer in the selection and provision of appliances for the use of the employe, *that care and prudence must be proportioned to what may properly be expected of him under the circumstances, and increases in a corresponding ratio with the danger and hazard necessarily connected with the use of the appliances.*"

The italicised portion of this instruction was excepted

to. It seems to me that there was no error in the instruction given. It is well settled that the degree of care required is measured by the danger of the forces employed.

The court instructed the jury that the intestate had a right to assume that wire No. 12 was dead, and that no act of omission or commission on the part of the defendant would contribute to make it a live one. All the evidence is to the effect that, at this time in the morning when the lamps were being trimmed, wire No. 12 was supposed to be dead, and that trimmers were not set at work trimming lamps on live wires, and the intestate had the right to assume that the wire was dead, and that it would not be made alive and dangerous by any negligent act of the defendant. The only possible criticism that can be made upon this instruction is that the court did not use the word "negligent," but no exception was taken upon this ground, and the jury must have understood, from the whole course of the trial and the charge, that the defendant was liable only for negligent acts of omission or commission.

We find no error in the record which calls for a new trial.

The judgment and order should be affirmed, with costs.

All concurred, except ADAMS, J., not sitting.

Judgment and order affirmed, with costs.

NOTE.—See note to *Lundquist v. Duluth St. Ry. Co.*, post.

CHARLOTTE E. WILLEY v. BOSTON ELECTRIC LIGHT COMPANY.*Massachusetts Supreme Judicial Court, Feb. 26, 1897.***INJURY TO EMPLOYE BY ELECTRIC SHOCK.**

A night patrolman in the employ of an electric light company was killed by electric shock while turning on the electricity by means of a cut out box, in order to light an electric lamp which he found in darkness, the same being in the line of his duty.

The shock was due to defective insulation, which had been discovered by a lineman of the company, who had thereupon adopted one rather than another method of cutting that lamp out from the circuit, keeping the others lighted.

Held, competent to show that the other course might have been adopted, which would have involved no danger to the unwarned patrolman.

Held, that this condition of affairs was within the purview of the language of the employers' liability act, Law 1887, Ch. 270, as being a "defect in the condition of machinery," and that it was or might have been part of the lineman's duty to see that it was in "proper condition."

APPEAL by defendant from judgment of Suffolk County Superior Court. Facts stated in opinion.

William N. Osgood and John L. Bates, for plaintiff.

Everett W. Burdett and Charles A. Snow, for defendant.

HOLMES, J.: This is an action under St. 1887, c. 270, secs. 1, 2, for causing the death of the plaintiff's husband by a defect in the condition of the defendant's works and machinery. The story, so far as material, is short: The insulation of the defendant's wire was burned off by lightning, near the pole where the accident happened. At 10 minutes past 7, it was discovered that there was trouble, and one Murphy, a night lineman, was sent out. He found the pole where the electricity was escaping, went

back to the station, and had the electricity shut off from the circuit. He then returned, and, by pushing the handle of a cut-out box on the pole, made it impossible for the electricity to reach that pole. He then went back again to the station and the electricity was turned onto the circuit, lighting all the lamps except the one upon the pole in question. At about a quarter before 9, the plaintiff's husband, a night patrolman, not knowing that there had been trouble, climbed up the pole, turned on the electricity by means of the cut-out box, as it was his duty to do when the trimmers had left it turned off, and received a shock, which caused him to fall to the ground, and in that way killed him. The main question is whether there was a case for the jury.

It may be assumed that it would have been impossible to discover and to remedy the damage to the insulation that night. All that was known was that for some reason the electricity was escaping at that pole. But it was proved, subject to the defendant's exception, that an hour or two later another of the defendant's men cut the wires running into the cut-out box, and joined them above the box, and in that way cut the electricity off from this pole; and it was argued that, in view of the probability of unwarned patrolmen doing just what the deceased did, this course should have been adopted by Murphy. We are of opinion that the evidence was admissible to show what was possible for Murphy, and that the argument was proper for the consideration of the jury.

For the defendant it was urged that the defect was the burnt insulation, and that this could not have been remedied before the accident. But this is narrowing the words of the statute to an impracticable precision. The words are "defect in the condition of the machinery," not "defect in the machinery." As the presiding judge very properly ruled, they do not refer to its working capacity, but to its condition with regard to the safety of the

employees. So, when the statute goes on to speak of the defect not having been remedied, it does not mean that the machine must have been made perfect for working purposes, but that its dangerous condition must have been ended. This may be done by a temporary device, as well as by permanent repairs. It was not necessary that the break in the insulation should have been discovered and mended, if, as was shown to be the fact, the danger could have been removed by easy and obvious means, either those adopted or by a warning signal.

There was evidence that, if cutting the wires was the proper thing for the defendant to have done, it was Murphy's business to do it. He was employed to find trouble where there was any, and to remedy it if he could; that is to say, he was or might have been found to be "intrusted with the duty of seeing that the works and machinery were in proper condition," so far as this accident was concerned.

As to the care shown by the deceased, the jury may have found that he received the shock too soon after the danger became manifest to avoid it by throwing the current off again. It was for the jury to say, too, whether, under the circumstances as they appeared to him, he ought to have protected himself more than they were warranted in finding that he did.

The deceased died from a concussion of the brain. There was testimony of a few scattered words having been uttered by him, but the jury were warranted in finding that he never regained consciousness so far as to suffer.

If there was any question of variance between the pleading and the proof, the case being one where the precise nature of the defect would be peculiarly within the defendant's knowledge, it would have been monstrous to allow the trial to go for nothing on that account. There was no surprise, unless to the plaintiff; and an amendment would have been allowed, or would be allowed now, as of course.

if necessary. The declaration pointed out the general character of the defect correctly, as a defect in the condition of the electric lighting apparatus upon the pole which has been mentioned. That was enough. The declaration described it further as a defective crane, and its defective connection with said light and said pole. The words can be stretched to cover the case, or they could be stricken out, and leave the declaration good.

Exceptions overruled.

NOTE.—Mass. St. 1887, ch. 270, §§ 1 and 2, referred to in the foregoing opinion, gives an action for damages to an employe who, while "himself in the exercise of due care and diligence at the time," sustains personal injury.

(1) By virtue of any defect in the condition of the ways, works or machinery connected with or used in the business of the employer, which arose from or had not been discovered or remedied owing to the negligence of the employer, or of any person in the service of the employer, and entrusted by him with the duty of seeing that the ways, works or machinery were in proper condition; or

(2) By reason of the negligence of any person in the service of the employer, entrusted with and exercising superintendence, whose sole or principal duty is that of superintendence.

Section 2 provides that "where an employe is instantly killed or dies without conscious suffering," under circumstances as above, his widow, or if he have no widow, his next of kin dependent upon his wages for support, "may maintain an action for damages therefor, and may recover in the same manner, to the same extent, as if the death of the deceased had not been instantaneous, or if the deceased had consciously suffered."

See note to *Lundquist v. Duluth St. Ry. Co.*, *post*.

A. P. YEARSLEY v. SUNSET TELEPHONE & TELEGRAPH
COMPANY.

California Supreme Court, November 30, 1895.

(110 Cal. 236.)

INJURY TO EMPLOYE OF ELECTRICAL COMPANY.

A lineman cannot recover from the electrical company employing him for injuries received by the breaking of a limb of a tree standing on private property, which he had climbed in order to string wires, because the tree was not an appliance furnished him by the company for the defective condition of which it was liable.

APPEAL by plaintiff from judgment of Superior Court, Los Angeles county, granting a nonsuit.

McComas & Schutze, for appellant.

Graff & Latham, for respondent.

GAROUTTE, J.: Plaintiff brought an action against defendant to recover damages for personal injuries received by him while in its employ. He was nonsuited, moved for a new trial, and now appeals from the judgment, and also from the order denying his motion.

The facts may be briefly stated as follows: Plaintiff was a lineman of defendant, a telephone and telegraph company, and was ordered by defendant to string a line of wire upon certain telephone poles. A pepper tree, situated upon private land, and between two of these poles, was to some extent an obstruction in stringing the wire. Thereupon plaintiff climbed the tree, and while engaged in arranging the wire, the limb upon which he was standing

gave way, and he was precipitated to the ground, with serious injury to himself.

The judgment of nonsuit was properly granted, as we fail to discover by the record any evidence of negligence upon the part of the defendant. Appellant's argument goes to the extent that defendant was guilty of negligence in furnishing defective appliances to be used in stringing the wires. But it cannot be claimed that this pepper tree was an appliance furnished by defendant. It belonged to a stranger, and was upon private property. Even conceding it an appliance, and a defective one, it was one of plaintiff's own choosing, and he must bear the burdens resulting from a bad exercise of judgment upon his part. Let us suppose plaintiff had fallen from a defective fence encountered in the line of his duty while stringing this wire, and had suffered injuries; would defendant be liable? Or let us assume that he had undertaken to swim a stream while in the line of his duty, and had been drowned; would there be a liability against defendant? We fail to discover it. Plaintiff was ordered to do certain work, namely, string wires. He was furnished the poles upon which to string them. Without demanding further appliances of any kind, or informing defendant that others were needed, he proceeded with the work, and, while so engaged, called to his aid additional appliances, of his own selection. He stands in the same position as though he had chosen for his use a frail plank or a rickety ladder, rather than a pepper tree.

As to the comparative knowledge of plaintiff and defendant pertaining to the defects in the tree, and the dangers arising from its use as an appliance, we pass the subject without consideration.

For the foregoing reasons the judgment and order are affirmed.

HARRISON, J., and VAN FLEET, J., concurred.

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THOMAS W. DIXON v. WESTERN UNION TELEGRAPH COMPANY.

U. S. Circuit Court, District of Indiana, Dec. 26, 1895.

INJURY TO EMPLOYEE FROM DEFECTIVE POLE.

Where, in the erection of a telegraph pole, an occasion arises for the casual use of a telephone pole belonging to another company to remove an obstructing wire, it is no breach of the master's duty to direct an employe to climb the telephone pole without a previous inspection of it having been made. The risk is incidental to the service and is assumed by the employe.

Cases of this series cited in opinion, appearing in bold faced type: *Flood v. W. U. Tel. Co.*, vol. 4, p. 402; *Junior v. Missouri Elec. Lt. & Power Co.*, vol. 5, p. 389.

ARGUMENT of demurrer to complaint.

Finch & Finch and *Dunn & Love*, for plaintiff.

Butler, Snow & Butler and *Chambers, Pickens & Moore*, for defendant.

BAKER, District Judge: The third paragraph of the complaint, to which a demurrer has been interposed for want of facts, does not aver that the telephone pole belonged to, or was under the control of, the defendant; and, from the fact that it is only empowered to erect and use poles for telegraphic purposes, the court must assume that the defective and unsafe telephone pole belonged to another company, and that the defendant had no interest in, or right of control over, it. The sole ground of negligence charged is in the failure of the defendant and its foreman to inspect

the telephone pole and the spikes which had been driven therein, before directing the plaintiff to climb it. It is also alleged that the defendant and its foreman failed to notify the plaintiff that the pole had not been inspected. But, unless the defendant was bound to inspect the pole before directing the plaintiff to climb it, it is not apparent how it could be held responsible for failure to notify him that it had not done something which it was under no obligation to do. The true question, then, is this: Is the defendant responsible to the plaintiff for failure to inspect a telephone pole which does not belong to it, and over which it has no control, but which was casually used as a means of removing an obstructing wire or wires which hindered the erection of a telegraph pole which the plaintiff, with others, was engaged in putting up? It is not averred that there is or was any custom, in the line of service in which the plaintiff was employed, making it the duty of the defendant to inspect telephone poles belonging to another company, which its employes might have occasion casually to climb in the performance of their duties; nor is it alleged that the defendant was under any duty, arising out of contract, to make such inspection. Therefore the duty of inspection, under the circumstances, if any such duty existed, was one imposed by law upon the defendant. Under the circumstances disclosed in this paragraph of the complaint, it does not seem to me that the law governing the relation of master and servant casts any absolute duty of inspection on the defendant, so that the mere failure to inspect the telephone pole would make it responsible for the accident to the plaintiff. So far as I can see, the defendant was no more bound to inspect the telephone pole than it would have been to inspect a tree, where limbs must be removed in order to erect a telegraph pole. It seems to me the risk was incidental to the service, and was assumed by the plaintiff, and that, if he was unwilling to incur the risk, he should

have insisted on an inspection of the pole before climbing it. Wood, Mast. & Serv. sec. 414; Bailey, Mast. Liab. p. 102; *Dixon v. W. U. Telegraph Co.*, 68 Fed. Rep. 630; *Flood v. W. U. Tel. Co.*, 131 N. Y. 603; *Garragan v. Fall River Iron Works Company*, 158 Mass. 596; *Trask v. Old Colony Railroad Co.*, 156 Mass. 298; *Cumberland Telephone Co. v. Loomis*, 87 Tenn. 504; *Junior v. Missouri Elec. Lt. & Power Co.* (Mo. Sup.) 29 S. W. Rep. 988. The plaintiff voluntarily climbed the pole, without requiring its inspection at the time, or ascertaining whether any one had previously inspected it. As the pole did not belong to the defendant, he knew, or ought to have known, that its maintenance in a state of reasonably safe repair was not a duty incumbent on his employer, and that no occasion requiring it to inspect the pole had arisen, or could arise until the moment when a necessity for its casual use should happen. So far as shown by the paragraph, no one knew that there would be any occasion to climb the telephone pole, until, in the erection of the telegraph pole, it was discovered that the removal of the obstructing wire or wires was necessary. When, in the course of the erection of a telegraph pole, an occasion arises for the casual and sporadic use of a telephone pole belonging to another company, to remove an obstructing wire, I do not think it a breach of the master's duty to direct an employe to climb such telephone pole, without a previous inspection of it having been made. Whether the defendant would be responsible for a failure to inspect, if the pole had belonged to it, it is not necessary to consider. The demurrer is sustained.

NOTE.—See note to *Lundquist v. Duluth St. Ry. Co.*, post.

DENVER TRAMWAY COMPANY V. WILLIAM J. NESBIT.

Colorado Supreme Court, April 20, 1896.

ELECTRIC STREET RAILWAY.—INJURY TO EMPLOYEE.

A person employed as conductor assumes the risk of injuries received in falling from an electric street railway car, due to the failure of the company to equip the car with a life guard to prevent a person's foot from passing under the wheels and upon the track.

APPEAL by defendant from judgment of District Court, Arapahoe county.

Statement of facts by GODDARD, J.: Action to recover damages for personal injuries caused by defendant's negligence. On September 24, 1890, the plaintiff, William J. Nesbit, was employed by the Denver Tramway Company in the capacity of conductor on its street cars. On October 17, 1890, in the morning, he took charge of a train consisting of a motor and trail car, and was engaged in operating the same upon the company's Lawrence street line.

On the third trip, while the train was going at a speed of from 12 to 14 miles an hour, in attempting to pass from the motor to the trail car, he fell to the ground, and the hind wheel of the trailer passed over his foot and ankle, causing serious and permanent injuries. Nesbit's statement as to how the accident occurred is undisputed, and is as follows: "I was passing from the motor to the trailer in order to collect a fare or fares, and I had hold with my right hand of the hand rail of the motor car; and I swung around in the usual way to catch hold of the hand rail of the trailer car, and thus transfer my hold. I came in contact with the hand rail of the trailer car, and thought I had it for the instant, but, just as I was transferring my

hold, the motor gave a sudden bound up, and threw my hand so high I missed the trailer, and fell." The negligence charged against the company, and which it is claimed by plaintiff was the proximate cause of the injury, was the failure to have what is termed a "life guard," or "fender," on the trail car, which extends around from the front to the rear, from six to nine inches outside the wheels, and so near the ground as to prevent a person's foot from passing under and on to the track. Upon the conclusion of the testimony, defendant asked the court to instruct the jury to find for defendants, which was denied. Motion for new trial denied, and judgment entered on this verdict, from which the company appeals.

A. M. Stevenson, for appellant.

Thomas, Bryant & Lee, for appellee.

GODDARD, J.: From the undisputed facts in this case, it appears that the appellee was engaged as conductor in operating a train of cars on appellant's street railway, and, while the train was in rapid motion, attempted to step from the rear of the motor to the trail car, and, by reason of the sudden bobbing up of the motor at the time, missed the hand rail on the trailer, and fell in such a way as to bring his foot and ankle under the rear wheel of the trailer. There was no fender or life guard on the trailer, and the company at the time was using trail cars both with and without the guard. Its absence or presence was open to observation, and easily discernible by the most casual inspection. Upon these conceded facts, we think it was the duty of the trial court to have withdrawn the case from the consideration of the jury, and have determined, as a matter of law, that they were insufficient to show liability on the part of the company.

Aside from the question whether the conduct of the

appellee in attempting to pass from the motor to the trail car while the train was running at a rapid rate of speed, and his fall, under the circumstances, was not the proximate cause of the injury, there are apparent other and controlling reasons which exempt the company from liability. Its failure to place a guard upon the trail car cannot be said to constitute negligence *per se*, and, whatever weight may be given to such failure as a factor conducing to the injury of a stranger, it certainly constituted no breach of duty on the part of the company towards its employes to operate its cars without such guard. In other words, an employer is under no implied obligation, by the contract of employment, to furnish any particular kind of machinery, or to adopt the latest improvements and appliances. He is only bound to see that that which he does employ is reasonably safe and suitable for the purpose for which it is designed. *Wood, Mast. & Serv.* 690; *C. B. & Q. R. Co. v. Smith*, 18 Ill. App. 119; *L. S. & M. S. R. Co. v. McCormick*, 74 Ind. 440; *Fort Wayne, J. & S. Railway Co. v. Gildersleeve*, 33 Mich. 133. While the want of a life guard may have enhanced the risk incident to appellee's employment, it did not constitute such a defect in the construction of the car as to render it unsafe or unsuitable for the business in which it was employed. As was said in *Sweeney v. Berlin & Jones Envelope Co.*, 101 N. Y. 520: "In the absence of defective construction, or of negligence or want of care in the preparation of machinery furnished by him, the master incurs no liability from injuries arising from its use. The general rule is that the servant accepts the service subject to the risks incidental to it; and where the machinery and implements of the employer's business are at the time of a certain kind, and the servant knows it, he can make no claim upon the master to furnish other or different safeguards." But even conceding that the want of a life guard rendered the car defective, and the company was guilty of a breach

of its duty in failing to supply it and in operating the train without it, such defect was certainly obvious, and one that the appellee could not have failed to observe if he had used his eyesight, and one that was as open and patent to him as to the company; and, if danger was to be apprehended from the use of a car in that condition, that result was equally apparent to him. Under these circumstances, he was precluded from recovering, by the well settled rule that an employe assumes all the risks naturally and reasonably incident to the service in which he engages, and those arising from defects or imperfections in the thing about which he is employed that are open and obvious, or that would have been known to him had he exercised ordinary diligence. By voluntarily continuing in the service with knowledge, or means of knowledge, equal to his employer's, of any defect in the appliances or the machinery used, and without objection or promise on the part of the employer to remedy the defect, the employe assumes all the consequences that result from such defect, and waives the right to recover for injuries caused thereby. *Rogers v. Galveston City Railway Co.*, 76 Tex. 502; *Texas & Pacific R. Co. v. Bradford*, 66 Tex. 732; *Jenney Elec. Light & Power Co. v. Murphy*, 115 Ind. 566; *Sullivan v. India Manufacturing Co.*, 113 Mass. 396; *Quick v. Minnesota Iron Co.*, 47 Minn. 361; *Brewer v. Flint & Pere Marquette R. Co.*, 56 Mich. 620; *Moulton v. Gage*, 138 Mass. 390; *Indianapolis, B. & W. R. Co. v. Flanigan*, 77 Ill. 365; *Ladd v. New Bedford R. Co.*, 119 Mass. 412; Whart. Neg. § 214, and cases cited; *Wells v. Coe*, 9 Colo. 159. Applying this rule to the facts of this case, it is clear that appellee was not entitled to recover, and the court below erred in refusing to direct a verdict for defendant. The judgment is reversed, and cause remanded. Reversed.

Note.—See note to *Lundquist v. Duluth St. Ry. Co.*, *post*.

REBECCA C. PIERCE, ADMINISTRATRIX, &c., Plaintiff in
Error, v. CAMDEN, GLOUCESTER & WOODBURY RAILWAY
COMPANY, Defendant in Error.

New Jersey Court of Errors and Appeals, April 21, 1896.

(58 N. J. Law. 400.)

ELECTRIC STREET RAILWAY—INJURY TO EMPLOYE—CONTRIBUTORY NEGLIGENCE.

Plaintiff's intestate, a conductor on an open trolley car, while standing on the running board and in the act of registering a fare, was struck by a trolley post and killed. The post was one of a few which were placed between the up and down tracks, and at irregular distances from the tracks; the one in question being only six and one-half inches, and the next one ten inches, from the outer edge of the running board. The intestate had run a car on that part of the road but once before, and it did not appear whether on an open or a closed car, whether or not he went on that side the car, or that he knew the danger. *Held*, that the questions of contributory negligence should have been submitted to the jury; also the question whether the danger was obvious and assumed by the contract of service.

APPEAL by plaintiff from judgment of non-suit. Facts stated in opinion.

John W. Westcott and *Henry S. Scovel*, for plaintiff in error.

J. Willard Morgan and *David J. Pancoast*, for defendant in error.

The opinion of the court was delivered by LUDLOW, J.: This suit was brought by the plaintiff, administratrix, under the statute, to recover damages for the death of her intestate, caused, as alleged, by negligence of defendant company. On the trial there was a motion for nonsuit at

the close of plaintiff's evidence, which was granted by the court, and exception thereto sealed, and this writ of error is brought to review that judicial action.

The case shows that the intestate, Pierce, was hired August 13, 1894, by the defendant company (defendant in error) for occasional service as an extra conductor on the company's trolley road operated between Camden and Woodbury. It was an ordinary trolley road, with double tracks; having its wires fastened to poles set on the outside of the tracks generally, along its route, which is about seven or eight miles.

The intestate had formerly acted as a conductor, for about eleven months, on the Camden Horse Railroad, in the city of Camden.

It does not appear that, before or at the time he went into defendant company's service, he had any knowledge as to its said road, the method of construction, or of the company's way of operating it. He was set to work occasionally, for the first two or three weeks, as conductor on the lower end of the route, a branch between Woodbury and Almonesson, the cars of which did not run this side of Woodbury. He did not have steady employment; what work he had was for the most part on that lower branch, and it was not clearly proved that prior to September 15, 1894, he ran a car, as conductor, on the main route between Woodbury and Camden, except for one day, September 11th.

On the night of September 15, 1894, about 10 o'clock, he left Woodbury for Camden in charge of an open car, or trailer, having several passengers.

This sort of a car is open on both sides. Its seats for passengers run crosswise the whole width of the car, and on each side, projecting therefrom, is a platform step, about seven and a half inches wide, running the car's length, which is for the use of passengers getting on and off, and particularly for the use of conductors for collect-

ing and registering fares, the rope for registry of fares running along the upper part of the car, within reach of this platform step.

On the night above mentioned, as this car left the limits of Woodbury, going at rapid speed, the conductor, Pierce, was moving along the platform step attending to his business; and, as he was reaching up for the registry rope to mark a fare, his head came in contact with a pole standing close to the car, and he was knocked off and almost instantly killed.

A passenger who happened to be looking at the conductor at the moment says that he saw him fall, and that the night was so dark that the pole could not be seen until at the very instant when it struck the conductor's head.

It was discovered that the pole by which the conductor was hit stood on the center space between the double tracks, and was only six and a half inches away from the outside edge of that platform step where the conductor was at work, and that it was one of a few (five or six) poles which, for some reason, had been set at that particular locality just outside of Woodbury, in the country part of the road in the center space between the double tracks. These five or six poles were set about ninety to one hundred feet apart, covering a distance of a few hundred feet; and the next pole north of the one which hit the conductor was set ten (10) inches off from said outer edge of said platform step.

The plaintiff's case having rested, a nonsuit was directed by the learned justice who tried the cause, on the grounds on which the motion was based—

(1) That the intestate knew of the danger and risk that his position as conductor involved, on that particular route, from the pole in question. As there was no direct evidence in the case proving any such knowledge on the part of the intestate, it was a matter of inference, from

the facts, whether he had or had not such knowledge, which was for the jury to determine.

(2) That the intestate was negligent in being unnecessarily on that side of the car while passing the pole which caused his death. This depended on the intestate's knowledge of the danger, and was also, as the case stood, a matter solely for the jury. The car was going at rapid speed on a very dark night.

(3) That the danger from this pole was obvious, and not latent, and was assumed by the contract of service. This was a question of fact, under all the circumstances as shown in this case. Some of the five or six poles were set irregularly, as to distance from passing cars. One was ten inches off, another six and one-half inches off, and all were from ninety to one hundred and twenty feet apart. One might be passed in safety, and another not.

Such a dangerous irregularity in the planting of these poles might, and might not, be discoverable to persons in rapidly passing cars, exercising ordinary, reasonable care and observation.

And while the intestate had on one occasion run a car on this part of the route, and passed the poles in question, he may have been on the opposite side of the car at that moment, or he may have passed other of these poles at that place in safety. He may on that occasion have run a closed car, and not an open car; but there was no direct evidence in the case before the court that the deceased ever had any knowledge of the pole in question, or of the danger or risks therefrom; and whether or not he ought to have known of the danger from the pole by which he was hit was a matter of inference from the facts and was for the jury. *New York, Susquehanna and Western Railroad Co. v. Marion*, 28 Vroom, 94, is in some respects applicable to the matter before us.

Let the judgment of non-suit be reversed, and *venire de novo* issue.

All concur for reversal.

NOTE.— See note to *Lundquist v. Duluth St. Ry. Co.*, *post*.

LEWIS E. WINDOVER AND LEWIS T. COLE, AS ADMINISTRATORS, ETC., OF LYMAN WINDOVER, DECEASED, Appellants,
v. THE TROY CITY RAILWAY COMPANY, Respondent.

New York Supreme Court, Appellate Division, Third Dept., April, 1896.

(4 App. Div. 202.)

ELECTRIC STREET RAILWAY—DUTY TO EMPLOYE—FAILURE TO EMPLOY SANDMAN.

In an action for damages for the death of a motorman, caused by his car running away while descending a steep hill, it was claimed that the brake was defective and that the company was negligent in failing to provide a sandman to sand the tracks.

The trial justice held that as to both these particulars the motorman assumed the risk of his employment, and, rejecting all evidence as to the sandman, non-suited the plaintiff.

Held, that as to the brake, it appearing that if the brake was defective, deceased must have known it, the trial court was right.

But that, there being no evidence that deceased knew that in addition to brakes and reversing the power, the use of sand was also requisite to regulate the speed of cars upon the hill in question, he could not be held to assume the risk arising from the failure of the company to employ a sandman.

APPEAL from judgment of non-suit granted at the close of plaintiff's case. The action was brought for damages for the death of a motorman employed by defendant upon its electric cars.

On the 28th day of December, 1893, in the city of Troy, N. Y., the said Windover was employed by the defendant, as he had been for several years before, as a motorman on

one of its street cars propelled by electricity. At the time he was injured he was in charge of car No. 27, then proceeding in a westerly direction down an incline on Hoosick street in that city. The tracks were slippery; the grade of Hoosick street is steep, having in some places a descent of from eight to nine feet to the hundred, and the car became unmanageable and ran away down the incline and across River street into a building on the west side thereof. The decedent was so injured by the collision that he died on the next day.

The alleged negligence of which the plaintiffs complained was that the brake on the car was defective, and also that the defendant failed to employ a "sandman" to put sand on the slippery tracks.

It was shown that car No. 27 on one occasion before, when under the charge of another motorman, had run away. The plaintiffs offered to show that on another occasion, prior to the injury to Windover, another of its cars ran away down the incline of Hoosick street. Also, that the defendant after that occurrence for two or three days had employed a man to put sand on the track, but had subsequently taken him off; also to show that at the time the car ran away, prior to the injury to decedent, the power on the car was reversed, but its speed was not diminished, because of the slippery condition of the tracks, there being no sand thereon. The evidence so offered was, on the objection of the defendant, excluded by the court. The following proceedings were also had on the trial during the examination of the witness Lewis E. Windover: "Q. (By the plaintiffs.) Was there any sandman provided for the cars running up and down that hill? [Objected to as incompetent and immaterial.] The Court: I don't see how it can be made material. If a stranger could know there was no sandman, the deceased must have known it; and, if he knew it, he must have assumed the risk himself, I think. An employe assumes all the apparent risks. I

will exclude the matter of the sandman. Mr. Black: I except. I offer to show that the road failed to provide any man or help with which to put sand upon this track of this railroad upon Hoosick street to assist in the stopping or management of the cars, and that because of that failure the accident occurred which produced Windover's death. The Court: I suppose you mean no sandman was employed at any time prior to the death of the deceased? Mr. Black: Yes, nor at that time. [The offer is objected to as before.] The Court: Excluded on the ground that it was a danger to be assumed; that it was a condition and fact known to the deceased. [Plaintiff excepted.]”

Frank S. Black, for the appellants.

Thomas S. Fagan, for the respondent.

PUTNAM, J.: The evidence produced by the plaintiffs to show that the brake on car No. 27, on which the decedent was the motorman at the time of the accident, was defective, was scarcely sufficient to sustain their contention. They were only able to show that, about a month before the injury to Windover, the brake worked hard; were it otherwise, however, it appeared that the deceased had been in the employ of the defendant as a motorman for several years. If the brake worked hard or was defective, he must have known it. He, therefore, having, with such knowledge of the defect, taken the responsibility of working on the car, and assumed the risk arising therefrom, no liability on account of the brake was incurred by the defendant. *Powers et al. v. The N. Y., L. E. & W. R. R. Co.*, 98 N. Y. 274; *Crown v. Orr et al.*, 140 id. 450; *Monaghan v. N. Y. Central & H. R. R. Co.*, 45 Hun, 113; *Odell v. Same*, 120 N. Y. 323; *Freeman v. The Glens Falls Paper Mill Co.*, 70 Hun, 530; affirmed, 142 N. Y. 639.

Hence, the only question in the case that requires consideration is that arising from the exclusion of the evidence

offered by the plaintiffs. The trial court refused to allow the plaintiffs to show that the corporation failed to supply a "sandman" for cars running on Hoosick street, stating that he would exclude the matter of the "sandman" on the ground that, if one was not provided by the defendant, Windover must have known it, and, therefore, he assumed the risk resulting from the absence of such an employee.

As the trial court excluded all testimony on that subject, of course we cannot know what evidence the plaintiff would have produced if permitted.

It was the duty of the defendant to supply the car on which the deceased was employed as a motorman with sufficient and proper help and with proper appliances and instrumentalities to safely operate it. *Flike v. Boston & A. R. R. Co.*, 53 N. Y. 549; *Booth v. Same*, 73 id. 38; *Whittaker v. D. & H. R. R. Co.*, 126 id. 544; *Cuppins v. The N. Y. C. & H. R. R. Co.*, 122 id. 557.

The decedent, as the employee of the defendant in the management of the car, had the right to rely upon the assumption that the defendant had performed this duty. He did not in the first instance assume risks resulting from the failure of the corporation to do so. As ANDREWS, J., remarked in *Booth v. Boston & Albany R. R. Co.* (*supra*, 40): "The rule that the servant takes risks of the service 'supposes,' says Lord CRANWORTH, 'that the master has secured proper servants and proper machinery for the conduct of the work.' *Bartonshill Coal Company v. Reid*, 3 Macq. 275." If, however, in the service of the defendant, Windover discovered that it had failed to furnish proper machinery and appliances for the car or sufficient help, and after such discovery voluntarily continued in the employ of the corporation, under the authorities above referred to, he must be deemed to have elected to have assumed the risks resulting from the neglect of the defendant to perform its duty. Thus it has been held that a ser

vant of a railroad company cannot recover for injuries resulting from the unskilfulness of his fellow servant negligently employed by the corporation, if he voluntarily remained in its service with knowledge of such fact. *Haskin v. The N. Y. C. & H. R. R. Co.*, 65 Barb. 129; affirmed, 56 N. Y. 608; *Laning v. The N. Y. C. R. R. Co.*, 49 N. Y. 521. So in this case, the decedent, having elected to remain in the service of the defendant with knowledge of the defective brake, cannot recover from the corporation for an injury resulting therefrom. The risk from the brake was apparent and must have been known to and voluntarily assumed by him.

But we are unable to concur with the view taken by the trial court, that the decedent assumed the risk resulting from the defendant's neglect to employ a man to place sand on its tracks, in the absence of any evidence or facts indicating such an assumption. We think the judge should have received the evidence offered by the plaintiffs, and afterwards have determined the question he assumed to decide in advance, if the facts proved by the plaintiffs should have shown that a "sandman" was required for cars of the defendant on Hoosick street and that it was negligent in not furnishing such an employe.

As we have already said, it was the duty of the corporation to supply the car with suitable machinery, appliances and help with which to manage it; and the deceased as an employe in the first instance could properly assume that it had performed this duty. He was not required to make a critical examination of those appliances, or to entertain doubts as to the cars being properly equipped. He knew that the speed of the car could be regulated in two ways, by the brake and by reversing the power. He could properly assume, unless he knew otherwise, that those means provided by the defendant were sufficient.

There was no evidence produced that he knew that a

"sandman" was required; it was not proved that the car had ever run away with him, or that he knew that it or any other of defendant's cars had run away before the accident.

We think the learned trial court was mistaken in assuming as a fact, in advance of the evidence offered, or which might have been produced, that Windover assumed the risk arising from the failure of the defendant to employ a "sandman." Had the court received such evidence, a state of facts might have appeared showing such an assumption, or, on the contrary, the circumstances might have indicated that the deceased, without any knowledge of the necessity of "a sandman," and believing that the defendant, as it was its duty to, had furnished the required instrumentalities to check the speed of the car, had not assumed a risk of which he was ignorant, or the evidence, if received, might have raised a question of fact for the jury as to such assumption. *Laning v. N. Y. C. R. R. Co.*, *supra*.

In 14 American and English Encyclopaedia of Law, 843, it is said: "A servant does not, of course, assume the risk of any dangers arising from unsafe or defective methods, surroundings, machinery or other instrumentalities, unless he has, or may be presumed to have, knowledge or notice thereof." In a note on the next page of the same volume it is also stated: "And it may be observed in this connection, that it is one thing to be aware of *defects* in the instrumentalities or plan furnished by the master for the performance of his services, and another thing to know or appreciate (the *risks* resulting or which may follow from such defects. The mere fact that the servant knows the defects may not charge him with contributory negligence, or the assumption of the risks growing out of them. The question is, did he know, or ought he to have known, in the exercise of ordinary common sense and prudence, that the *risks*, and not merely the defects, existed. *Cook v.*

St. Paul, etc. R. Co., 34 Minn. 45; *Russell v. Minn. etc. R. Co.*, 32 Minn. 230."

We think the above quotations, which are supported by many authorities in the work in question, state the correct principle applicable to such a case as this.

Windover did not assume the risk in question, unless he knew that the power to reverse and the brake were insufficient to prevent the car from running away, and that a "sandman" was required. It could not be properly assumed as a fact, in the absence of any evidence in that regard, that he did know. In the absence of such knowledge, the risk arising from the absence of the "sandman" was not an apparent one. In *Haskin v. The N. Y. C. & H. R. R. Co.* (*supra*), it appeared that the deceased knew of the unskilfulness of his co-employee, and, after such knowledge, voluntarily remained in the service of the corporation.

We think, therefore, the court below erred in disposing of the case in advance of the evidence that might be produced, and in declining to receive the testimony offered by the plaintiffs.

The question arising in the case as to the contributory negligence of the deceased was, we think, under the facts shown, clearly for the jury.

The judgment should be reversed and a new trial granted, costs to abide the event.

All concurred, except LANDON, J., dissenting.

Judgment reversed, new trial granted, costs to abide the event.

NOTE.— See note to next case.

GUST LUNDQUIST V. DULUTH STREET RAILWAY COMPANY.*Minnesota Supreme Court, July 3, 1896.***ELECTRIC STREET RAILWAY—DUTY TO EMPLOYE—FELLOW SERVANTS.**

(Head-note by the court):

The defendant, a street railway company, required by its rules that its employes in charge of its cars should give timely warning, by proper signals, to its employes engaged in track-repairing, of the approach of its cars. The plaintiff, in reliance on such rules, and while at work repairing the track of the defendant, as its employe, was struck and injured by a car, by the failure of the motorman to give such signals, and by his running the car at a rate of speed prohibited by law. *Held*, that the plaintiff and the motorman were fellow servants, and that the defendant is not liable to the plaintiff for his injuries resulting from the negligence of the motorman.

APPEAL by plaintiff from judgment of District Court St. Louis county.

John Jenswold, Jr., for appellant.

Billson, Congdon & Dickinson, for respondent.

START, C. J.: The defendant is a street railway corporation, and operates, with others, a double track street railway line upon Superior street, in the city of Duluth. On July 10, 1894, the plaintiff, while as work as the servant of the defendant repairing its tracks on such street, was struck and injured by one of its cars which was then being operated along one of its tracks. He brought this action to recover damages for such injury, alleging in his complaint that it was due to the defendant's negligence. At the trial, the defendant, upon the pleadings and certain

admissions made by the plaintiff, moved the court to dismiss the case, on the ground that the negligence of which plaintiff complained was that of the motorman, his fellow servant. The motion was granted, and plaintiff appealed from an order denying his motion for a new trial.

The short facts of the case, as disclosed by the complaint and the admissions at the trial, are these: The plaintiff was one of a crew of men employed by the defendant, who were engaged in repairing the tracks, by taking up and relaying the pavement between the rails over which the defendant's street cars operated by electric power passed frequently at irregular intervals. In order to make the place a reasonably safe one for the men thus employed, the defendant adopted a rule whereby it required those in charge of its cars to give timely warning of their approach to the crew, and it was the custom to do so. The plaintiff pursued his work in reliance upon this rule and custom and due observance of them by the defendant, and while so engaged, and without notice of the approach of the car which struck him, this car approached the place where the plaintiff was at work at the rate of 10 miles an hour, and the motorman in charge thereof failed to make any effort to slacken its speed, and negligently failed to give any signal or warning of its approach. The charter of the defendant provides that no car shall be run within the limits of the city at a greater rate of speed than six miles an hour. The principal question presented by these facts for our decision is whether the negligence of the motorman was that of a fellow servant or a vice principal.

The provisions of chapter 13, Laws 1887, modifying the law as to injuries sustained by one servant by the negligence of his fellow servant in cases of railway companies, have no application to the defendant street railway company. *Funk v. St. Paul City R. Co.* (Minn.), 63 N. W.

Rep. 1099. Counsel for the plaintiff claims that it was the defendant's duty to furnish to plaintiff a reasonably safe place in which to work, and, as a means of making the place in question safe, it was necessary to give him due warning of the approach of its cars, and, having made a rule requiring the motorman to give such warning, his failure to do so was the negligence of the defendant, and not of a fellow servant. He supports his contention with ability and the citation of adjudged cases in other jurisdictions; but, whatever may be the rule elsewhere, we must hold that the negligence of the motorman was that of a fellow servant, as we regard the question settled by the previous decisions of this court. It is true, as claimed, that it was the duty of the defendant to use reasonable care to provide a safe place in which the plaintiff was required to work, and that this duty, like the duty to furnish safe machinery and proper appliances for doing the work, was an absolute one, which the defendant could not delegate, so as to be relieved from liability in case the duty was neglected. But if the safe place or safe machinery which the master has furnished and keeps in repair is made unsafe by the negligence of his servants, whom he has selected with due care, in using or operating the place or machinery, and one of his servants is injured thereby, such negligence is that of a fellow servant. *Foster v. Minnesota Central R. Co.*, 14 Minn. 360 (Gil. 277); *Collins v. St. Paul & Sioux City R. Co.*, 30 Minn. 31; *Connolly v. Minneapolis Eastern R. Co.*, 30 Minn. 80; *Randall v. R. Co.*, 109 U. S. 478. The plaintiff relies in support of his proposition upon the following cases, in this court: *Erickson v. B. & O. R. Co.*, 41 Minn. 500; *Anderson v. Northern Mill Co.*, 42 Minn. 424; *Westaway v. Chicago, St. Paul, &c. R. Co.*, 56 Minn. 28; *Schulz v. C. M. & St. P. R. Co.*, 57 Minn. 271. These cases are not in point.

In the first one the law of fellow servants was not involved, for the plaintiff in that case was not a servant of the railway company, but of an independent contractor. The remark quoted in his brief by counsel, from the opinion and syllabus of the case cited, to the effect that the duty of the defendant to plaintiff in respect to giving proper signals of the approach of trains was the same whether the plaintiff was in its employment or that of its contractor, means only that the railway company owed the same obligations to exercise care for the safety of an employe of a contractor working on or near its tracks as it would if he was its own employe. It is to be remembered that the case arose and the opinion was written after chapter 13, Laws 1887 (defining the liabilities of railroad companies for injuries to their servants by the negligence of fellow servants), was enacted. In the second case cited the negligence of the employe of one person resulted in the injury of an employe of another. No question of fellow servant was involved. The third case related to the duty of a railroad company to a traveler to give its usual signals of the approach of its trains at a private wagon crossing. The last case cited arose after chapter 13, Laws 1887, became a law. The plaintiff and the motorman in the case at bar were fellow servants. *Neal v. No. Pac. R. Co.*, 57 Minn. 365. The plaintiff was injured by the negligence of the motorman in failing to give any signal of the approach of the car, or to slacken its speed, as it was his duty to do. But such duties did not appertain to the work of furnishing, constructing or equipping a safe place for work or safe machinery for the execution of the work, but to the operation of the street railway; hence his negligence on the premises was that of a fellow servant, and the plaintiff cannot recover.

The plaintiff further claims that the fact that the car

which struck him was being run at the time at a rate of speed exceeding six miles an hour, in violation of law, renders the defendant's liability for his injuries absolute. Statutes and ordinances regulating the speed of railway trains, providing for the giving of signals at crossings, and for fencing the right of way, do not abrogate the qualifying principle of the common law relating to contributory negligence, assumption of risks and injuries by the negligence of fellow servants. *Randall v. B. & O. R. Co.*, 109 U. S. 478; *Fleming v. St. Paul & Duluth R. Co.*, 27 Minn. 111; *Johnson v. Chicago, Milwaukee & St. P. R. Co.*, 29 Minn. 425; *Moser v. St. Paul & Duluth R. Co.*, 42 Minn. 480. The fact that one of the acts of negligence of the motorman complained of in this case was prohibited by law does not affect the question of the liability of the defendant to the plaintiff for injuries resulting solely from the negligence of his fellow servant. Order affirmed.

NOTE 1.—In the twelve cases preceding this note, damages were sought against electric companies for injuries caused to their employes. In the first six of these cases, the injury was by electric shock. In most of the cases, the decision turned wholly or in part upon the peculiar rules governing the relation of master and servant, in case of injury to the latter, as distinguished from cases of alleged negligence resulting in injury to persons not employes.

Thus, the rule that the employer must furnish reasonably safe machinery and appliances is applied in *W. U. Tel. Co. v. McMullen*, ante, p. 338; *Lincoln St. Ry. Co. v. Cox*, ante, p. 352, and *Windover v. Troy City Ry. Co.*, ante, p. 381. In *Harroun v. Brush Elec. Lt. Co.*, ante, p. 357, it is stated that the degree of diligence required of the employer increases with the danger and hazard necessarily connected with the use of the appliances. And in *McAdam v. Central Ry. & Elec. Co.*, ante, p. 348, that electric railway companies are bound to a very high degree of care to protect their employes and the public alike from the dangers of uninsulated trolley wires. The rule above stated has negative application in *Yearsley v. Sunset Teleph. & Tel. Co.*, ante, p. 368, in which it was held that a tree upon private property, from which a lineman fell and was injured, was not an appliance furnished by the company employing him, and hence it incurred no liability.

Lundquist v. Railway Co.

The rule that the servant assumes the ordinary risks of his employment is applied or laid down in *W. U. Tel. Co. v. McMullen*, ante, p. 338; *Dixon v. W. U. Tel. Co.*, ante, p. 370, and *Denver Tramway Co. v. Nesbit*, ante, p. 373.

That a servant assumes the risk of obvious dangers and cannot recover for injuries due to defective appliances of which he had knowledge, is illustrated in *Pierce v. Camden, &c. Ry. Co.*, ante, p. 377, and *Windover v. Troy City Ry. Co.*, ante, p. 381. In the latter case it was held that the motorman who was killed must have had knowledge of a defective brake, but that as it did not appear that he knew the need of sand on the track, he did not assume the risk of the company's failure to provide a sandman.

That one employe cannot recover against the company for injuries resulting from the negligence of a co-employe is the gist of the decision in *Lundquist v. Duluth St. Ry. Co.*, ante, p. 388.

NOTE —2. The following are memoranda of additional cases upon the same general subject and illustrating the same principles:

In *John C. Greene v. W. U. Tel. Co.*, United States Circuit Court, District of Minnesota, March 11, 1896 (72 Fed. Rep. 250), an action for damages for injury to a lineman who while engaged, with other employes, under a foreman in erecting telegraph poles, was injured by the falling of an insufficiently guyed pole which he had climbed by order of the foreman, the following is the language of the court in directing a verdict for the defendant:

"The COURT: I think this was a risk that the plaintiff assumed when he was hired. It was a part of his duty. He was not only to help erect and climb poles and string wires, but to help put up those gin poles. While the business may have been a hazardous one, he assumed the ordinary risks incident thereto, and among them that of a pole not being properly guyed, owing to negligence on the part of his fellow workmen. Conceding that the foreman was a representative of the company, I do not think it has anything to do with the case. Plaintiff was not taken from any particular duty and put into one that he was not hired to do, which was extra hazardous, and unnecessarily exposed him to a danger which he did not contemplate by virtue of his employment; but he was hired to do just what he was ordered to do, and in so doing the accident happened. I think this man was injured by a risk which he assumed by virtue of his employment, and I instruct you that the defendant is entitled to your verdict."

In *Bland v. Shreveport Belt Ry. Co.*, Louisiana Supreme Court, June 15, 1896 (48 La Ann. 257), in which a lineman while taking down a guy wire from a pole which had been insecurely planted was killed by the falling of the pole upon him, it appeared that the vice of construction was concealed, and that the officers of a preceding board of management had been notified of the defect. Held, that the company could not excuse

itself on the plea of want of notice; that the lineman did not voluntarily place himself in a dangerous position, and was bound to know only patent defects; that the master did not perform his duty of furnishing suitable appliances.

In *Atlantic Ave. Ry. Co. v. Van Dyke*, United States Circuit Court of Appeals, Second Circuit, Feb. 20, 1896 (72 Fed. Rep. 458), the plaintiff was a lineman who, while at work on a tower wagon making repairs to the wires of the defendant's trolley road, was knocked from the tower wagon and injured by a car. There was evidence of an attempt to stop the car, and a question arose as to the sufficiency of the appliances for doing so quickly. Held, proper to submit this question to the jury, with the instruction that the defendant was not bound to provide the very best appliances, but only such as reasonable and prudent men would provide.

In *Louise J. Sundy v. Savannah St. Railroad*, Georgia Supreme Court, Oct. 5, 1895 (96 Ga. 819), it appeared that the husband of plaintiff was a motorman in the employ of the defendant; that while standing upon the step of his car, with his back to a pole standing from twelve to eighteen inches from the car, and examining some part of the car, he was struck on the head by the pole and killed. He knew the location of the pole and could have seen it before reaching it. After the accident the pole was moved so as to stand about twice as far from the track. Judgment of non-suit was affirmed.

In *Whipple v. N. Y., N. H. & Hartford Railroad Co. and Crandell v. Same*, Rhode Island Supreme Court, July 24, 1896 (35 Atl. Rep. 305, 307, respectively), substantially the same questions were decided in each case, viz., that the erection of a telegraph pole by a railroad company so near its track as to endanger its employes while performing their duties, is negligence; and that an employe ignorant of the dangerous condition and using ordinary care cannot be said to have assumed such risk as incident to his employment.

In *Kenneson v. West End St. Ry. Co.*, Massachusetts Supreme Judicial Court, Feb. 25, 1897, the following is nearly the entire opinion:

HOLMES, J.: This is an action for running over the plaintiff's intestate with an electric car on which he was employed as motorman. The car had reached its destination, Somerville. The conductor went to the Somerville end, shifted the trolley and pushed in the fender. The deceased took off the motor handles and gong tapper, went to the other end, which now would be the front of the car, and was seen to stoop down, and take hold of the fender. Very shortly afterwards, the car started, and he was caught under the wheels, and fatally injured. What caused the car to start is wholly uncertain. See *Ross v. Cordage Co.*, 164 Mass. 257. It is suggested that the car was defective, but there is no satisfactory evidence that it was, or, if it was, that the defect was or ought to have been known to the defendant, or that it was of such a nature as to be likely to cause the start. It is equally or more likely that the car moved after the trolley was turned and readjusted, because the electricity had not been fully shut

off, or because the deceased in some way moved the cable under the car which let on the power. The presiding judge was right in taking the case from the jury.

In *Baltimore Trust, &c. Co. v. Atlantic Traction Co.*, United States Circuit Court, Northern District of Georgia, June 6, 1895 (69 Fed. Rep 858), held that the conductors of two electric railway cars on the same road are fellow servants, and that the common employer is not liable for injury to one of them resulting from a collision caused by the negligence of the other.

In *W. H. Gier v. Los Angeles Consol. Elec. Ry. Co.*, California Supreme Court, July 3, 1895 (108 Cal. 129), a conductor on an electric street railway was injured by being caught and crushed between two cars. The accident was due to the negligent act of the motorman, plaintiff's co-employee. Held, that there was not sufficient evidence of defendant's negligence in employing the motorman to justify a verdict for plaintiff.

In *Britton v. West End St. Ry. Co.*, Massachusetts Supreme Judicial Court, Feb. 25, 1897 (46 N. E. Rep. 111), held, that a paint shop superintendent, acting as a motorman, was to be regarded as a motorman and not as a superintendent, in applying the employer's liability act (St. 1887, ch. 270), to an action for injury to an employee who was assisting by guiding the trolley.

For said act, see note to *Willey v. Boston Elec. Lt. Co.*, *ant*, p. 387.

LOWELL M. REDFIELD AND OTHERS, Respondents, v.
OAKLAND CONSOLIDATED STREET RAILWAY COMPANY,
Appellant.

California Supreme Court, Dec. 6, 1895.

(110 Cal. 277.)

ELECTRIC STREET RAILWAY—INJURY TO PASSENGER.

The death of a passenger upon a trolley car was caused by the car running away and jumping the track.

The following circumstances appeared: The car was in charge of the motorman alone. At a switch he had to go to the rear platform to adjust the trolley. In returning he fell, and the car got away. He had not shut off the power when he left the front platform.

Held, that since in passing the switch the attention of one man was requisite at each end of the car, there was conclusive evidence of negligence

of the company in furnishing but one man to perform both duties. Or, if the motorman could have safely gone to adjust the trolley, provided he first shut off the power, then his failure to shut off the power was negligence, with which the company was chargeable.

APPEAL by defendant from judgment of Superior Court, Alameda county.

Commissioners' decision.

Chickering, Thomas & Gregory, R. M. Fitzgerald and Carl H. Abbott, for appellant.

Hall & Earl, for respondents.

HAYNES, C.: The defendant, the Oakland Consolidated Street Railway Company, operated an electric street car line between the city of Oakland and Mountain View Cemetery.

On May 6, 1893, Adeline B. Redfield and her children, Lowell M. Redfield and Mattie A. Redfield, got upon one of the defendant's cars, at or near Mountain View Cemetery, to return to the city of Oakland. This car was operated by only one man, as was customary upon that line. The car in question had a solid glass partition separating the body of the car, in which the seats were, from the platform at each end, which was intended for the motorman; and the only way the motorman could pass from one end of the car to the other was along the step on the outside of the car.

From the cemetery the track runs towards the city, for some distance, on a practically level grade; then ascends a grade to the summit of a hill, at a switch, which is the highest point of the track. From that point the track descends. On the summit of the hill the track is comparatively straight for about thirty-five feet. From the switch the track descends at a varying grade for a distance of about one-half a mile to Booth street, and then turns to the right, or west.

When the car was going up the hill above mentioned, the motorman, who was then upon the front end of the car, jumped off, and got on again at the rear end of the car, and took hold of the trolley rope to adjust the trolley around a curve over the switch, the car going up the hill slowly. When the switch was reached the motorman had some trouble in putting the trolley on the right wire. In attempting to return to the front platform, he fell to the ground, and when he got up he was unable to catch the car, which by this time was going down the hill. The car ran down the hill to the curve, where it left the track and went across the road on one side, until it struck the gutter, when it righted itself and flew across a field until it stopped. Said Adeline B. Redfield in some way struck her head and fell off the car after it left the track, and received such injuries that she died therefrom on the 29th day of June, 1893.

This action is prosecuted by her husband, Horace A. Redfield, and her two minor children, for the recovery of damages. The jury returned a verdict for the sum of fourteen thousand dollars, upon which judgment was entered; and this appeal is from the judgment, and also from an order denying the defendant's motion for a new trial.

The points made by appellant will be noticed substantially in the order in which they are presented in its brief.

6. It is also contended "that the evidence shows that the injury complained of was the result of an unavoidable accident and inevitable casualty," and that, therefore, the evidence was insufficient to justify the verdict. The fact that in passing the switch the attention of one man was required at each end of the car and that one man could not be at both ends at the same time, conclusively shows negligence on the part of the defendant in putting but one man in charge of the car to perform both duties. Or if,

on the other hand, the man in charge could have stopped the car by shutting off the power, and changed the trolley to the proper wire, it was negligence for him to leave the motor with the power on, and the car in motion, to go to the other end of the car to adjust the trolley. The fall of the motorman while attempting to return to the front platform was accidental, but it was not accidental that but one man was put in charge of the car when two were required, or that the one man did not stop the car to adjust the trolley, if the adjustment could be made in that way. The fact that for some months one man had operated the car without accident does not show the absence of constant danger, while the circumstances under which the accident occurred show that it might have occurred many times, and that it was a constant and continuing negligence to operate the car with but one man in charge.

We find no ground upon which the judgment and order appealed from should be reversed, and advise that they be affirmed.

SEARLES, C., and VANCLIEF, C., concurred.

Per CURIAM: For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

NOTE.—See note to *Danville St. Car Co. v. Payne*, *post*.

DENVER TRAMWAY COMPANY V. WILLIAM REID.

Colorado Supreme Court, April 6, 1896.

(22 Col. 349.)

ELECTRIC STREET RAILWAY—INJURY TO PASSENGER.—CONTRIBUTORY NEGLIGENCE—COMPARATIVE NEGLIGENCE.

Whether or not it is contributory negligence for a passenger to attempt to alight from a slowly moving trolley car is a question to be determined by the jury under the circumstances of any given case.

The doctrine of comparative negligence prevails only in the States of Georgia, Illinois and Tennessee, and perhaps a few others.

APPEAL by defendant from judgment of Court of Appeals affirming a judgment of the District Court, awarding plaintiff \$5,500 damages for injuries sustained by a fall from an electric street car.

The opinion below is reported 4 Am. Electl. Cas. 332, where the portions of the charge to the jury which were under consideration upon this appeal are set forth in full.

James H. Brown and A. M. Stevenson, for appellant.

V. D. Markham, for appellee.

HAYT, C. J.: The plaintiff, William Reid, at the time of the accident, was a passenger on one of the street cars of the Denver Tramway Company. The train in which the plaintiff was riding consisted of two cars, both used for the carriage of passengers, the first car being what is known as a "motor car," and the second a "trailer." These cars were being propelled by electricity, communicated by means of a trolley and wires overhead. The accident occurred between eight and nine o'clock in the

evening, there being at the time a large number of passengers upon the two cars.

The only evidence for the plaintiff as to the accident was given by himself. His testimony in reference thereto is contradicted by several witnesses introduced on behalf of the company. Reid testifies that at the time of the accident he was upwards of sixty years of age, a blacksmith by trade, that he had taken passage upon one of the defendant's trains, and paid five cents, the usual fare therefor; that he desired to get off at Tenth street; that when he was some distance away he signaled the conductor to stop at the next street, this being Tenth street; that he was at the time sitting on the front seat of the rear car; that as the car approached Tenth street he was preparing to alight; that he arose in his seat, and stepped down on the side step, the car at the time moving slowly; that as he was stepping down he was thrown between the cars by a sudden stop of the cars; that by the fall he was rendered unconscious, or at least at the time of the trial had no recollection of what occurred immediately after he fell.

From other witnesses it was shown that the car was stopped within a few feet of the point where the accident occurred; that Reid was found lying in the street, with his foot in the life guard in front of the wheels of the trailer; that when he was extricated he seemed to be in a dazed condition, which some of the witnesses attributed to inebriety. Dr. Hart, his physician, who was summoned soon after the accident, testifies that he found him suffering from severe bruises and burns; that both hands and both ankles were burned somewhat, his left hand and left ankle severely; that the left ankle was burned to the bone, and the bone covering torn to a considerable extent, and that he was bruised upon the back and elsewhere about the body.

The theory of the plaintiff being that these burns were caused in some way by escaping electricity, that plaintiff's

body had come in contact with some part of the car that was charged with electricity, and that when his ankle struck the ground the circuit was completed, experts were examined, whose evidence tends to show that the burns might have been caused in this way, although expert electricians were introduced by the defendant, who testified that the burns could not have been caused in the manner claimed by plaintiff, or by electricity from the car in any way.

Some half dozen witnesses were introduced on behalf of defendant, who contradicted his statements as to the manner in which the accident occurred. These witnesses testified that the plaintiff, not waiting for the car to stop, got up, and stepped off in the middle of the street, the cars being required to stop only at the far side of intervening streets. The conductor testified that he was engaged in collecting fares at the time, and saw no signal from Reid to stop, but that the car was being stopped for other passengers to alight.

The verdict is against the weight of evidence, and it is probable that the result was influenced by this improper testimony, and the remarks of plaintiff's counsel [referring to certain testimony in impeachment of a witness, and remarks of counsel with reference thereto], and therefore, the judgment must be reversed.

We are also of opinion that the first instruction is erroneous. By it the jury are told, *inter alia*, that: "The plaintiff getting up from his seat and preparing to get off of the car before the car had fully come to a standstill, but was very slightly moving, was not contributory negligence on the part of the plaintiff, unless such getting up from his seat and otherwise preparing to get off the car and alighting therefrom was done in a careless or negligent manner were the circumstances and surroundings

considered. For, if such negligence—if there was any—on the part of the plaintiff, was slight, or the remote cause of the injury, he may recover, notwithstanding such slight negligence or remote cause.”

In the last few years horses have been almost entirely displaced as a motive power on street car lines in cities by cables and electricity, and the operation of cars and trains correspondingly accelerated. As transit becomes more rapid, the dangers incident to street railway travel are correspondingly augmented, and as the danger is increased the law exacts greater care on the part of both the passenger and the carrier. For this reason many of the decisions applicable to passengers on horse cars are inapplicable to the newer methods of transportation. The cable and electric service of to-day more nearly resembles the ordinary railway train, and the case law which has grown up with reference to the latter is more in point. It has been held in a number of cases that a passenger upon a railway “has no right to attempt to alight from a train of cars when in motion, and if he undertakes to do so without the knowledge or direction of any employe of the company, it is at his peril.” *Secor et al. v. T. P. & W. Ry. Co.*, 10 Fed. Rep. 15, and cases cited; 2 Wood’s Railway Law, §§ 305, 1126; Hutchinson on Carriers, § 643; *Solomon v. Manhattan Ry. Co.*, 103 N. Y. 438.

In other jurisdictions it has been held that in case of injuries received by a passenger in alighting from a slowly moving train, the question of plaintiff’s negligence is a question of fact for the jury to determine. And this seems to be the trend of recent authority, although this rule is subject to some exceptions. Beach on Contributory Negligence, Section 147; *Leslie v. Wabash, &c. Ry. Co.*, 88 Mo. 50; *Taylor v. Missouri Pacific Ry. Co.*, Mo. 26 App. 336; *Penn. R. Co. v. Lyons*, 129 Pa. St. 113; *Covington v. Western, &c. R. R. Co.*, 81 Ga. 273.

The latter view we think the better one as applied to passengers upon electric cars. In this case the plaintiff says that he was preparing to leave the train by stepping down on the side step, when he was violently thrown to the ground. This being the preparation stated by the plaintiff, the jury must have believed from the instruction that they were not at liberty to hold him guilty of contributory negligence by reason of this act, unless performed in a careless or negligent manner. The accident occurred between eight and nine o'clock at night. The plaintiff was at the time upwards of sixty years of age, and whether, in these circumstances, it was negligent on his part to thus step down on the moving car, was not a question of law for the court, but a question of fact for the jury.

Then, again, this instruction seems to recognize comparative degree of negligence. It is misleading in this respect, if not positively erroneous. Outside of the States of Illinois, Georgia and Tennessee, and perhaps a few others, such comparison is not permitted; the test elsewhere being the plaintiff's contributory negligence. And it may now be considered as well established outside of the above jurisdiction that in cases of this character the plaintiff cannot prevail if his own negligence contributed to the injury, and without which it would not have happened. *Lord v. Pueblo Smelting & Refining Co.*, 12 Colo. 390; *Beach Contrib. Neg.* § 34; *O'Keefe v. Chicago, &c. Railroad Co.*, 32 Iowa, 467; *Wells v. N. Y. &c. Railroad Co.* 24 N. Y. 181; *Wilds v. Hudson, &c. Railroad Co.*, 24 N. Y. 430; *Louisville, &c. Railway Co. v. Shanks*, 94 Ind. 598; *Starry v. Dubuque, &c. Railroad Co.*, 51 Iowa, 419.

For the reasons given, the judgment of the Court of Appeals will be reversed, with directions to reverse the judgment of the trial court. *Reversed.*

NOTE.— See note to *Danville St. Car Co. v. Payne*, *post*.

THE CICERO AND PROVISIO STREET RAILWAY COMPANY v.
FRANK MEIXNER.

Illinois Supreme Court, October 11, 1895.

(160 ILL. 820.)

ELECTRIC STREET RAILWAY—INJURY TO PASSENGER—CONTRIBUTORY
NEGLECT.

It is not contributory negligence as matter of law for a person to attempt to board an electric street car while in motion.

Questions of negligence and contributory negligence held properly submitted to the jury.

APPEAL by defendant from judgment of Appellate Court, affirming a judgment of the trial court entered upon the verdict of a jury in an action for damages for personal injuries received by plaintiff while attempting to board an electric street car.

William H. Barnum, John A. Post and John B. Brady,
for appellant.

Brandt & Hoffman, for appellee.

Justice PHILLIPS delivered the opinion of the court:

One of the errors assigned for the reversal of this judgment is the refusal of the trial court to instruct the jury to find for the defendant, at the close of the plaintiff's evidence, and the refusal of the court to give a like instruction that, as a matter of law, the plaintiff had failed to make out his case, which was asked at the close of the argument.

It is urged that the evidence of plaintiff did not warrant the jury in finding that the injury of plaintiff was the result of defendant's negligence, as charged in the declara-

tion, and also that the evidence of plaintiff establishes that he was not at the time of his injury in the exercise of reasonable care and caution. Both of these matters are ordinarily questions of fact, to be determined in the trial and appellate courts. As this court has frequently held, it is not our province to determine or pass upon such questions, further than to ascertain whether or not there was, at the close of plaintiff's case, evidence tending to prove the facts alleged in the declaration, and whether, at the close of all the testimony, when the motion to instruct for plaintiff was refused, the evidence, with all the inferences which the jury can justly draw from it, was insufficient to support a verdict for plaintiff, and that, if one was returned, it must be set aside. *Lake Shore and Michigan Southern Railway Co. v. Richards*, 152 Ill. 59; *Wenona Coal Co. v. Holmquist*, 152 id. 581; *Pulman Palace Car Co. v. Laack*, 143 id. 242; *Purdy v. Hall*, 134 id. 298; *Chicago and Northwestern Railway Co. v. Dunleavy*, 129 id. 132; *Bartelott v. International Bank*, 119 id. 259; *Simmons v. Chicago and Tomah Railroad Co.*, 110 id. 340.

Two elements alleged in the declaration, and necessary to be established by plaintiff before he could recover, were negligence of the defendant, as charged, and that the plaintiff was in the exercise of due care and caution for his own safety. It is not the province of this court to say whether these facts are proven. The evidence before the trial court and jury tended to show that plaintiff, on August 10, 1891, was on Madison street, in Chicago, about two blocks east of Desplaines avenue. He was walking east on the north side of Madison street, intending to board an east bound car on defendant's line. When a car approached, and was distant one hundred and fifty or two hundred feet, plaintiff, still being on the sidewalk on the north side of the street, signaled to the motorman, by throwing up his hand. He then proceeded diagonally

to the middle of the street, and continued walking easterwardly, in the space between the two street car tracks. The next street crossing east of this was Thomas street. He continued between the two tracks some twenty-five feet east of this crossing, when the car overtook him. Plaintiff contends that, before the car reached him, he had seen the motorman turn the brake, so that, when he attempted to get on, the car had slackened down to a speed of about four or five miles an hour. He was still on the left hand or the north side of the track, and desired to get on the front platform. As the car went by, he caught the hand rails on each side of the front platform, when he says the speed of the car was suddenly accelerated, and he lost his hold, was dragged some forty feet or more, and thrown under the wheels, and his left hand was crushed off. The material parts of plaintiff's testimony, as above set forth, were corroborated by two spectators who witnessed the occurrence—one from the street, and the other in an adjoining yard, not far distant. Many of these facts were contradicted by the motorman and four passengers on the front platform, who testified that the car was running at a speed of seven or eight miles an hour when it reached appellee, and that the speed had not been decreased, for the reason that no signal was seen, and that the speed was not accelerated, but, on the contrary, the current was turned off, and the brake applied, as soon as plaintiff attempted to get on. It was contended and testified to by these witnesses that plaintiff had his back turned to the car while walking, and, as the car approached and overtook him, he attempted to catch it with both hands; that the motorman at once attempted to stop the car, and did so within a space of thirty-five or forty feet. Some passengers in the car also testified that there was no decrease in speed until after the accident occurred.

In the discussion of the question as to whether the court erred in refusing to instruct the jury to find for defendant,

only the facts as presented and shown by plaintiff's evidence will be considered.

The serious results of the injury to appellee are not disputed. He was a cabinet maker, and his skill as such depended on the use of both his hands.

We have examined this record with the utmost care, to ascertain if this judgment is by it sustained. Negligence is ordinarily a question of fact for the jury. In *Wabash Railway Co. v. Brown*, 152 Ill. 484, this court has said: "Negligence is ordinarily a question of fact. Where the evidence on material facts is conflicting, or where, on any disputed facts, fair minded men of ordinary intelligence may differ as to the inferences to be drawn, or where, on even a conceded state of facts, a different conclusion would reasonably be reached by different minds, in all such cases, negligence is a question of fact. . . . With all the facts considered, if there is a reasonable chance of conclusions differing thereon, then it is a question for a jury. Negligence may become a question of law where, from the facts admitted or conclusively proved, there is no reasonable chance of different reasonable minds reaching different conclusions." To hold that the trial court should have given the general instruction as asked, this court must hold that it was not a question of fact as to whether or not plaintiff was guilty of negligence contributing to the injury, but that it was a question of law, and was negligence *per se* for the plaintiff to attempt to board the car in question, running at the rate of speed as shown. If it was a question of fact, then it was properly submitted by the trial court to the jury.

This court has held in a number of cases that it is negligence for a passenger to get off a train of which the motive power is steam, while the cars are in motion. *Illinois Central Railroad Co. v. Lutz*, 84 Ill. 598; *Ohio and Mississippi Railway Co. v. Stratton*, 78 Ill. 88; *Illinois Central Railroad Co. v. Chambers*, 71 Ill. 519; *Illinois Centra*

Railroad Co. v. Slatton, 54 Ill. 138; *Chicago and Alton Railroad Co. v. Randolph*, 53 Ill. 510. In *Chicago and Alton Railway Co. v. Scates*, 90 Ill. 586, this court said, p. 592: "If it is to be regarded dangerous for a passenger to get off a train of cars in motion, it is likewise dangerous to get on the train when in motion. If a person is guilty of such negligence when getting off a train of cars in motion as will preclude a recovery for the injury received, upon the same principle and for the same reason a person injured in getting on a train in motion, and in consequence thereof, should be regarded guilty of such negligence as will prevent a recovery." The courts of other States have adopted the same rule, that it is negligence for a passenger to alight from a moving train of cars, the motive power of which is steam.

The rule as applicable to steam railways is relaxed when applied to horse cars or street railways. *Terre Haute, etc. Railroad Co. v. Buck*, 96 Ind. 346; *Stoner v. Pennsylvania Co.*, 98 Ind. 384. Beach on Contributory Negligence, section 90, says: "It is well settled that it is not contributory negligence *per se* for one to alight from or to board a moving street car, and here, again, we find the severity of the rule as applicable to steam railways essentially relaxed." Booth on Street Railway Law (sec. 336) lays down the same rule in the following language: "Although the act of boarding a car while in motion is always attended with some risks, the rules applicable to persons entering cars operated by steam are not usually applied with the same strictness to street railways operated by horse power. It is a general rule, established by numerous decisions, that if a person who has the free use of his faculties and limbs has given proper notice of his desire to be taken up, and the speed of the car has been slackened in the usual manner, it is not negligence *per se* to attempt to get on while it is moving slowly, and that, if a person is injured under such circumstances, the ques-

tion of his contributory negligence is ordinarily one of fact for the jury."

The doctrine is established in nearly all of the States where the question has arisen that it is not negligence *per se* for a passenger to board or alight from a street car operated by horse power, and the question of contributory negligence is one of fact for the jury. *McDonough v. Metropolitan Railway Co.*, 137 Mass. 210; *Eppendorf v. Brooklyn, etc. Railroad Co.*, 69 N. Y. 195; *Ganiard v. Rochester City, etc. Railroad Co.* (Sup.) 2 N. Y. Supp. 470; *Morrison v. Broadway, etc. Railroad Co.*, 130 N. Y. 166; *People's Passenger Railroad Co. v. Green*, 56 Md. 84; *North Chicago Street Railroad Co. v. Williams*, 140 Ill. 275. In the case of *Sahlgaard v. St. Paul City Railway Co.*, 48 Minn. 232, where the motive power of the car was a cable, the same rule as above stated was held also to be applicable.

In large and populous cities, where cars are constantly receiving and discharging passengers at crossings, it is a well known fact that many of such passengers board cars and alight therefrom before the car has come to a full stop, and that they do so usually with perfect safety. It is well known, also, that street car companies tacitly invite many passengers to board and alight from their cars by checking up to a slow rate of speed, and immediately starting up at a greater speed when the passenger is safely aboard or has alighted. It would be impossible for a court to lay down the rule as to what particular rate of speed would be sufficient notice to a passenger that, if he attempted to get on or off, he would be held guilty of contributory negligence. It would also be a great hardship, and unjust, to lay down a general rule that a passenger attempting to board any street car while in motion at all should be held in contributory negligence. Every person is supposed to know that the boarding of a moving train or car is attended with the danger of a misstep or fall, and a fall beside a

moving car is liable to bring some part of the body or limbs in danger of being crushed. It is the duty of those having control and management of cars designated for traffic on the public streets to bring such cars to a full stop at such places as are convenient and necessary for the purpose of discharging and receiving passengers, and it is no less the duty of passengers, in getting on or off such cars, to observe due precaution for their own safety. We cannot say, however, that it is inconsistent with ordinary care and caution for a person to board a street car while in motion. Whether one has not exercised due care or caution in so doing is to be determined by the particular circumstances in each case, and is therefore a question of fact to be submitted to the jury.

The cases heretofore cited in which it has been held that it is not negligence *per se* for a person to board or alight from a street car while in motion have reference, in a great degree, to horse cars. As we have stated, there is a wide distinction in cases of such motive power, as the act is not in itself negligence, while in cars propelled by steam it is negligence to do so. Where the motive power is electricity, a question not entirely free from difficulty is presented. The modern progress of methods of transportation, the recent discoveries of the possibilities of electricity as a motive power, and the perfection which it has within a few years developed and attained, have demonstrated a power popular as a method of transit. The purpose to which a power of this character is applied must to some extent be considered. Electricity has now in a great measure superseded horse power. The same style of cars, and often the same cars, are used, the same streets are traversed, and a like number of stops, and in like places, are made, to receive and deliver passengers. Electricity as a motive power, while stronger and more powerful and with possibilities of a greater speed, is at the same time more nearly under the control of the person in charge,

than horse power. The strict rule in force regarding the negligence of a person alighting or boarding an ordinary train of steam cars had for it many good and sufficient reasons, which are not applicable to the electric car, as in general use. In the latter case, stops are frequent, and opportunity for great speed is not presented. Steps for passengers are near the ground, and the chances of a misstep or fall are not so great as in steam cars, as constructed. Streets on such lines are generally paved, and in that respect passengers may as safely depart or board such cars in one place as another, whereas, in the case of steam cars, platforms are generally provided. While in electric cars the possibilities of speed are greater than in the case of horse cars, yet the general operation and management of such cars so nearly approaches to that of horse cars that it must be held that the same rule of law which, in the cases cited and a long line of other cases, holds that it is not negligence *per se* to board or depart from such cars while in motion, is also applicable to electric cars.

It follows, therefore, from this application of the rule, that in the case at bar it was solely a question of fact as to whether or not there was negligence in the acts of the defendant, or contributory negligence on the part of the plaintiff. There was evidence tending to prove the facts alleged in the declaration, and it was not error in the trial court to refuse the general instruction asked. It was proper for the court to submit the question to the jury.

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NOTE.—See note to *Danville St. Car Co. v. Payne, post.*

THE STATE OF MARYLAND TO THE USE OF MARY SHARKEY
V. LAKE ROLAND ELEVATED RAILWAY COMPANY.

Maryland Court of Appeals, June 18, 1896.

ELECTRIC STREET RAILWAY—INJURY TO PASSENGER—CONTRIBUTORY
NEGLECT.

A passenger who, though acquainted with the line and with its dangers, and in spite of a warning notice conspicuously placed in the car, steps upon the foot board of a moving trolley car for the purpose of alighting, his body being outside the car, and is struck by a trolley post, and injured, is guilty of contributory negligence which bars recovery against the railway company.

APPEAL by plaintiff below from judgment of Baltimore Superior Court.

M. R. Walter, Joseph S. Heuisler and Charles M. Heuisler,
for the State.

I. N. Steel, J. E. Semmes and F. K. Carey, for appellee.

RUSSUM, J.: This is an appeal by the plaintiff below from the rulings of DOBLER, J., sitting in the Superior Court of Baltimore city without the intervention of a jury, in a suit brought by the appellant (plaintiff below) against the appellee for the recovery of damages for the death of the husband of the equitable plaintiff, caused by the alleged negligence of the appellee. The appellee runs and operates an electric railway, for the transportation of passengers only, from the corner of North and Fayette streets, in Baltimore city, to Roland Park, in Baltimore county. There were two sets of tracks, running north and south, on Roland avenue, the distance between which was 61 inches. The wires supplying the electric fluid by

which the cars are propelled are supported by poles, ten inches in diameter, planted between these tracks. The car on which this accident occurred was an open or summer car, and was constructed without guards so that passengers could enter or alight on either side. It had eight or ten rows of seats running transversely, and a footboard on each side, extending its entire length. This car projected one foot over the tracks and the footboard six inches additional, making the entire projection eighteen inches. On the morning of September 11, 1894, James T. Sharkey, the husband of the equitable plaintiff, boarded this car on its trip north to Roland Park. He had often ridden on it before, and always got off at Cold Spring lane. He took a seat on the left side, the fourth row from the rear. After the car left Heath Brook Station, and while it was some distance from Cold Spring lane, he looked back several times, but the conductor who was at the rear end, with his manifest in his hand, preparing to make it up, did not see him. He then arose, and placed his left foot, which was nearest, on the foot rail, as if to alight, caught with both hands the two uprights between the benches, one in each hand, and was turning around and motioning the conductor, and while in that position, and while the car was some distance from Cold Spring lane, and moving rapidly, was struck by one of the poles planted between the tracks, thrown from the car, and died in about two hours afterwards. At each end of the car there was a notice warning passengers (1) against riding on the platform, or putting their heads or arms out of the windows; (2) prohibiting jumping on or off the car while in motion; (3) that cars stop for passengers at cross streets only; (4) against attempting to leave the car on the bridge over Stony Run, at any point, or on the elevated railway, except at stations; and (5) admonishing them that "loss of life or injury to persons may result from a violation of that notice." At the close of the testimony the defendant

offered a prayer asking the court "to give judgment in its favor against the plaintiff, because the undisputed evidence in the case shows that the death of the said Sharkey was directly contributed to by his own negligence," which was granted, and from this ruling this appeal is taken. There is no difficulty about the law applicable to the facts just set forth. There being direct evidence of the cause of the injury, there is no room for the invoking of a presumption in regard to it, because the proof of the fact rebuts the presumption. *Andrews case*, 39 Md. 329; *Philadelphia, &c. R. Co. v. Stebbing*, 62 Md. 518. The responsibility of the appellee for the safe carriage of passengers is founded upon contract. The law casts on it the obligation of providing safe means of transportation, and the employment of skilful agents; and, while it is responsible for the consequences of any failure or omission in this respect, as well as for the negligence of its agents, there is also imposed on the passengers the duty to obey the reasonable regulations of the company in entering, occupying and leaving its cars; and nothing less than some existing necessity, beyond his control, can justify a passenger in a breach of his contract, and render the company liable for injuries received in consequence of a known violation of such regulations. *Pennsylvania R. Co. v. Zebe*, 33 Pa. St. 318. And this court has uniformly held that in such a case the question of negligence on the part of the passenger is a legal question for the court to decide. *Wilkinson's case* 30 Md. 233; *Andrew's case*, 39 Md. 329; *Cason's case*, 72 Md. 377. In this case the undisputed evidence shows that Sharkey had frequently ridden on this car, that the warning against jumping off the car while in motion was conspicuously posted, and that by the exercise of reasonable care he could have known what was necessary for his own safety. The accident was the direct result of his infraction of the rules of the company,

made for the safety and protection of those who traveled in its cars. There was suitable and sufficient provision made within the cars for all the passengers. There was ample room to have turned around inside the car, and attracted the attention of the conductor either sitting or standing; but, instead of availing himself of this means, he, voluntarily, and without any occasion therefor, took an exposed position, placing one foot outside, and, with his body beyond the car line, attempted to alight from a rapidly moving car, with his back to the poles, which he knew were there. Andrew's case, 39 Md. 329; Leonhardts case, 66 Md. 70; Cason's case, 72 Md. 382. The case of *Baltimore & Potomac R. Co. v. Swann*, 81 Md. 400, has been earnestly pressed upon us to sustain the appellant's contention as to negligence on the part of the appellee in the location of the poles and in the arrangement and management of the car. In that case the female plaintiff had purchased a ticket, and had acquired a right to be conveyed in one of the carrier's passenger coaches. The carrier substituted a baggage car, and in the course of the journey she was injured; and this court held that negligence could not be imputed to the passenger because she took passage in the baggage car, when no other means was offered; and that the questions whether the carrier had made diligent effort to procure a passenger car, and whether the baggage car was a safe vehicle, were proper questions to be submitted to the jury. In this case no such questions arise. The appellee had furnished a passenger coach, which, so far as the record discloses, was a safe vehicle for the transportation of passengers, and in doing so fulfilled its obligation to carry the passenger safely, "so far as it could be done by the exercise of the highest degree of care and skill which was consistent with the undertaking." Nor is there anything in this case tending to impute any negligence to the appellee in the structure and care of its track, or in any of the sub-

sidiary arrangements necessary to the safety of the passenger. The appellee's cars being propelled by electricity, it was necessary that the trolley wires, charged with electricity, should be suspended over the tracks, and to do this it was necessary that poles should be placed between the tracks for their support. There is nothing in the record indicating that the location of the poles between the tracks or the distance from the tracks at which they were planted was either unusual or dangerous in railway construction. Nor was there any negligence on the part of the defendant company in failing to have a bar on the left hand side of the car. There was no obligation on the defendant company to restrict passengers to their places, nor to prevent persons old enough and intelligent enough to take care of themselves from acts of imprudence. Passengers who performed their part of the contract for transportation by obeying the regulations of the company were not endangered by the proximity of the poles to the tracks, nor injured by the absence of the bar on the left side of the car. Nor was the failure of the conductor to see Sharkey's signal negligence on his part. The next stop was Cold Spring lane, to which station Sharkey was destined, and the conductor was only bound to attend the signal in time to stop the car at that station. For these reasons we are of opinion that there was no error in the ruling of the court below, and the judgment will, therefore, be affirmed.

NOTE.—See note to *Danville St. Car Co. v. Payne*, *post*.

OMAHA STREET RAILWAY COMPANY v. WALTER I. MARTIN.

Nebraska Supreme Court, April 10, 1896.

(48 Neb. 65.)

ELECTRIC STREET RAILWAY—INJURY TO PASSENGER—CONTRIBUTORY NEGLIGENCE.

It is not contributory negligence as matter of law, for a person to attempt to board an electric street car when it is in motion.

Although such person negligently exposed himself to danger, yet he may recover against the company if the latter, after discovering his danger, inflicted the injury upon him because of its failure to exercise ordinary care, or if it failed to exercise ordinary care to discover the danger in season to avoid it.

APPEAL by defendant below from judgment of District Court, Douglas county. Facts stated in opinion.

John L. Webster, for plaintiff in error.

George W. Cooper, contra.

RAGAN, C.: Walter I. Martin sued the Omaha Street Railway Company, in the District Court of Douglas county, for damages which he alleged he had sustained by reason of the negligence of the employes of that company, while attempting to board one of its cars. Martin had a verdict and judgment, and the street railway company prosecutes to this court a petition in error.

1. Martin, in his petition, alleged that the servants of the railway company negligently failed to stop its train of cars at the usual stopping place a reasonable and sufficient length of time to permit him to safely get on the cars, "and, just as plaintiff was in the act of ascending
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the steps of the . . . back car of said train, defendant's . . . servants . . . then in charge of . . . said cars . . . did so negligently and carelessly manage said train of cars . . . that said cars were suddenly and rapidly, and without notice or warning to plaintiff, rted forward. . . . thereby violently throwing plaintiff to and upon the surface of the street, and under said moving car." The street railway company in its answer, among other things, alleged "That said plaintiff negligently and carelessly endeavored to board said train while it was in motion, instead of waiting for the same to come to a stop; . . . that said plaintiff, in so endeavoring to board said train while in motion, slipped and fell, and so was injured." On the trial, Martin himself testified as follows: "I took up my grip when I went to signal the car—the motorman in charge of the car. I came over to the track, and, when the front car got along, it was going a little too fast to board, and I stepped out, and when the rear car came—the front end of the rear car came along—the car almost stopped, just about stopped; and I took hold of the hand rail, and put my foot on the step, and was raising myself up to put my right foot up the next step, and there was a sudden jerk and it threw me on the street." The conductor of the car by which Martin, in attempting to board it, was hurt, testified as follows: "Well, sir, I noticed the motorman applying his brake, and I looked over and saw a man standing there, so I applied my brake to let a man off the train. At that time it was going a little slow, because we were going down grade, any way, and the first thing I saw was when we got to about the corner, I saw Mr. Martin. I saw a man with a package. . . . As we slowed up to let him on, the train came nearly to a perfect standstill. Mr. Martin—I didn't know what his name was at that time—he caught hold of the front end of the trailer with his right hand, and I saw then he couldn't get a good foot

hold with his left foot, got a good foothold with his right foot; and I noticed that, and made a grab for him and he slipped."

The first assignment of error argued in the brief is directed to the refusal of the District Court to give certain instructions requested by the street railway company, and it is insisted that the court erred in refusing to give these instructions, as they embodied the law of the case applicable to the testimony given in support of its theory of the accident. The first of these instructions is as follows:

The second instruction is as follows: "The jury are instructed that if you find from all the evidence that the accident to the plaintiff was caused or brought about by his attempt to get on board the train while the train was being brought to a stop, but before the train had come to a full stop, then he was guilty of contributory negligence, and cannot recover, and your verdict should be for the defendant." This instruction the court did not err in refusing to give. It was not for the court to any whether or not Martin was guilty of negligence in attempting to board this train while it was moving. The court might have properly told the jury that, if Martin attempted to step on the train while it was in motion, that was evidence tending to prove negligence, but it was for the jury to say what the effect of that evidence was. *Omaha Street Railroad Co. v. Craig*, 39 Neb. 602, was an action for damages, brought by Miss Craig against the railway company for injury which she alleged she had sustained through the negligence of that company in not bringing the car to a standstill when she was about to alight therefrom. The railway company's theory of the accident was—and its evidence tended to support it—that Miss Craig's injury was caused by her stepping from the car, while it was in motion, to the platform or foot board thereof, and not holding to the uprights at the ends of the seats. The

eminent counsel who makes the argument for the street railway company in the case at bar, in the Craig case pressed this court to decide, as a matter of law, that if Miss Craig stepped from the car while in motion, and was thereby injured, this act raised against her a conclusive presumption of negligence. Answering that argument, the court said: "But we think that Miss Craig's stepping out on the platform of the car before it came to a full stop, at the time and under the circumstances, and her failure to avail herself of the hand holds on the uprights of the seats, were, at most, facts to be submitted to the jury as evidence tending to show negligence on her part. Reasonable men might honestly draw different conclusions as to whether this act or omission of Miss Craig's was, under the circumstances, negligence; and therefore it was for the jury to say whether the evidence of what she did, and what she omitted to do, warranted a conclusion of negligence on her part. It is for the court to say what act or omission is evidence of negligence, but it is for the jury to say whether the evidence establishes negligence." The third instruction refused was as follows: "The jury are instructed that it was the duty of the plaintiff to wait until the train had come to a stop before attempting to get on board the car, and if you find from the evidence that the train was being brought to a stop, but before the train had come to a full stop the plaintiff attempted to get on the car, and, in so doing, slipped and fell, then the plaintiff cannot recover, and your verdict should be for the defendant." What has just been said in reference to instruction No. 2 disposes of the assignment that the court erred in refusing to give this instruction.

The fourth instruction refused was as follows: "The jury are further instructed that, in determining whether the plaintiff attempted to get on board the train before the train had come to a full stop, you should take into account, not only the evidence of the defendant's witnesses, but

also such witnesses as were called by the plaintiff, if any, who testified that the train had not come to a full stop when the plaintiff attempted to get on board." This was, in effect, asking the court to say to the jury: One of the matters being litigated here is whether Martin attempted to board the train while it was in motion. The defendant's witnesses, and some of Martin's witnesses, have testified that he did. You should consider the evidence of all these witnesses. It was the duty of the jury to consider all the evidence of all the witnesses. The jury was sworn to try the case according to the evidence, and we will not presume they did not; but we do not think the District Court was under any obligation—if, indeed, such a course would have been proper—to single out one point being litigated, and say to the jury, All the witnesses on one side of the case have testified that a certain thing was done, and part of the witnesses on the other side have testified that this thing was done, and you should consider the evidence of these witnesses. This would have been not only to give too much prominence to one point being litigated, but to tell the jury to consider only the evidence directed to one side of the matter in dispute.

The fifth instruction refused, of which complaint is made, was as follows: "The jury are further instructed that the fact that the plaintiff was carrying a package, as described by himself and other witnesses, was a circumstance requiring upon his part a higher degree of care, while attempting to get on board the train, than if he had not been burdened or incumbered by such package." The plaintiff was required to exercise ordinary care, and nothing more. The law requires every reasonable man to exercise caution commensurate with the obvious peril with which he is confronted; but this means no more than that he is, under all circumstances, required to exercise

ordinary care, the danger and his knowledge thereof considered. *City of Beatrice v. Reid*, 41 Neb. 214.

One criticism of counsel is directed to that part of the instruction quoted in which the court told the jury, in effect, that, if they should find that Martin had negligently exposed himself to danger, yet he might recover, if the railway company, after discovering his danger, inflicted the injury upon him because of its failure to exercise ordinary care. This instruction was correct. See *Union P. Railway Co. v. Mertes*, 35 Neb. 204; *Chicago, B. & Q. Railroad Co. v. Grablin*, 38 Neb. 90; *Shearman & Redfield*, Negligence, sec. 25. But counsel says that the instruction was erroneous because not applicable to the facts in evidence in the case: (1) Because the evidence did not show that Martin had placed himself in a position of danger. The evidence introduced in behalf of the railway company all tended to show that Martin attempted to board this train while it was in motion, and we think it a matter of common sense that a person, when about to step on or off a moving train, is in a situation of danger. The second argument is that the instruction was not applicable because the evidence does not disclose that the railway company knew that the plaintiff, Martin, was in danger. We have already quoted the evidence of the conductor of the train, to the effect that Martin attempted to step on the train while it was in motion, and that he, the conductor, saw that he was about to fall and that he attempted to catch him. Another criticism made to this instruction is to that part of it by which the court told the jury that the railway company would be liable for Martin's injury if, after discovering his danger, it failed to exercise ordinary care, or if it did not discover his danger, because of its failure to exercise ordinary care; in other words the argument is that the railway company was only bound to exercise ordinary care after it discovered Martin's

danger, and that its employes were under no obligation to observe Martin or his conduct until they found him in a dangerous situation. Under the circumstances in evidence in this case, we do not think the court erred in telling the jury that the railway company would be liable for Martin's injury if it failed to exercise ordinary care after discovering his dangerous situation, or if, through its want of ordinary care, it failed to discover his dangerous situation until too late. The evidence is undisputed that Martin signaled the train to stop; that the conductor and the motorman saw him, and slowed the train down, and that he had a grip in his hand, and that he was intending and attempting to board the train. Under these circumstances, it was incumbent upon the employes of the railway company to know that Martin was on the train before they started it. *Chicago, B. & Q. Railroad Co. v. Grablin*, 38 Neb. 90, was an action by Grablin, as administrator, against the railroad company, for negligently, as he alleged, causing the death of his child, while trespassing on the railway company's track. The railway company requested the trial court to instruct the jury as follows: "You are instructed, . . . if you find that the negligence of the boy in going upon the track caused or contributed to the injury, you must find a verdict for the defendant, unless you further find that the company or its servants were wilfully or recklessly negligent after the boy was discovered, or that the engineer wilfully avoided seeing the boy on the track sooner than he did see him." The refusal of the District Court to give this instruction was assigned here as error, but the court sustained the action of the trial judge, and held that if the engineer could, by exercising such vigilant and careful lookout as was consistent with his other duties as engineer, have seen the boy in time to save him, then his neglect to exercise such careful and vigilant lookout was negligence. These are the only assignment of error which we deem it necessary

to notice. The judgment of the District Court is in all things right, and is affirmed. Affirmed.

NOTE.—See note to *Danville St. Car Co. v. Payne*, *post*.

EAST OMAHA STREET RAILWAY COMPANY v. LEWIS N.
GODOLA.

Nebraska Supreme Court, March 17, 1897.

ELECTRIC STREET RAILWAY — INJURY TO PASSENGER.

When an electric motor train, crowded inside and out with passengers, is run into a curve at such speed and with such force as to toss persons seated within to the opposite side of the car, and to throw others from the platform of the motor and trailer to the ground while striving to maintain their positions thereon, a finding of negligence is neither unreasonable nor unwarranted.

It is not contributory negligence *per se* to ride upon the platform of an electric street car.

Whether or not the line of an electric railway is constructed upon private property is immaterial in an action for damages based upon neglect of the duty of the company as a common carrier.

Case of this series cited in opinion, appearing in bold faced type: *Pray v. Omaha St. Ry. Co.*, vol. 5, p. 407.

APPEAL by defendant from judgment of District Court, Douglas county. Facts stated in opinion.

V. O. Strickler, for plaintiff in error.

Wm. F. Gurley and *Frank T. Ransom*, for defendant in error.

Post, C. J.: The East Omaha Street Railway Company, hereafter called the defendant, is engaged in operating a suburban railway by means of electricity, the initial point of its line of road being Sherman avenue, near the eastern

boundary of the city of Omaha, and its terminus at Courtland Beach, between four and five miles distant. From Sherman avenue the course of the defendant's track is due east, along what is described as Locust street, to a point about midway between the city and the Missouri river, from whence it extends north to Courtland Beach. On the 6th day of August, 1893, as alleged by the defendant in error, hereafter called the plaintiff, he took passage upon one of the defendant's trains at Courtland Beach for Omaha, and the said defendant, in consideration of the usual fare therefor, undertook to safely carry him to his aforesaid destination; that the train upon which the plaintiff had taken passage was greatly crowded, as the defendant's servants well knew, yet notwithstanding such fact, and in disregard of their duty to the plaintiff and the other passengers thereon, the conductor and motor-man in charge of said train negligently and carelessly caused the same to be run into and upon the curve of the defendant's said track at Locust street, at an unusual and dangerous rate of speed, whereby the plaintiff was thrown from said train, in consequence of which he suffered personal injuries, to his damage, &c. The plaintiff recovered in the District Court upon the cause of action stated, and the defendant prosecutes error. The allegations of the answer will sufficiently appear from our discussion of the questions presented by the brief and argument of counsel for the defendant.

It is first insisted that there is a failure of proof to sustain the allegation of negligence, and that the speed of defendant's train at the time of the injury was both reasonable and necessary, in view of the circumstances of the case. But, as said by counsel for plaintiff, men in human affairs judge largely by results; and when, as is clearly shown by the record herein, a motor train, crowded inside and out with passengers, is run into a curve with such force as to toss persons seated within to the opposite side

of the car, and to throw others from the platform of the motor and trailer to the ground while striving to maintain their positions thereon, a finding of negligence fails to strike the judicial mind as either unreasonable or unwarranted. In this connection a brief reference to evidence may not be out of place. Sergeant Whalen, a police officer of the city of Omaha, testified that he lost his hold upon the front platform of the trailer, and was thrown off, when the train struck the curve. Arthur Creighton, who was sitting upon the dashboard of the trailer, and holding with his right hand to the hood of the car, was, as he testified, thrown over the head of a friend, and lit upon the ground 10 to 15 feet distant. Dr. Carpenter testified that as the train struck the curve he saw several men flying through the air, and was being thrown off himself. John W. Parr, when asked about what occurred when the train reached the curve at Thirteenth and Locust streets, answered: "I don't know what street it is, but where they throwed everybody off." Philip McLarnen was asked, "What occurred when you got to that point?" meaning the curve in question, and replied: "They went around that curve at a pretty good hickory. There was several of them took a tumble; they rolled off like pumpkins." Mr. Lloyd, who, with his wife and son, was seated inside the motor, testified that he was thrown to the opposite side of the car, and that the passengers were in a state of commotion. There was evidence ending to prove that the speed of the train when it struck the curve was from 12 to 15 miles an hour. Mr. Gray, the conductor in charge, testified that he was running from 7 to 10 miles an hour, and admitted that it was unsafe to go around the curve in question at a rate of speed exceeding 5 miles an hour. It is true the foregoing statements are in part contradicted by the witnesses for the defendant, but the evidence, under the well established rule of this court, is, to say the least, quite sufficient to sustain the verdict

upon the issue of negligence in the operation of the train. The plaintiff was not, as a matter of law, guilty of contributory negligence in riding upon the platform of the motor. *Germantown Pass. Ry. Co. v. Walling*, 97 Pa. St. 55; *Nolan v. Brooklyn City & Newtown R. Co.*, 87 N. Y. 63; *Topeka City R. Co. v. Higgs*, 38 Kan. 379; *Matz v. St. Paul City R. Co.*, 52 Minn. 159; *Geitz v. Milwaukee City R. Co.*, 72 Wis. 807; *City Ry. Co. v. Lee*, 50 N. J. Law, 438; *Upham v. Detroit City R. Co.*, 85 Mich. 12. It is, on the other hand, as said in *Pray v. Omaha St. Ry. Co.*, 44 Neb. 167, evidence of negligence on the part of a street railway company to carry passengers greatly in excess of the seating capacity of its trains, and permitting them to stand upon the platforms and steps of its cars. Again, street railway companies are, as was held in *Spellman v. Lincoln Rapid Transit Co.*, 36 Neb. 890, and *Pray v. Omaha St. Ry. Co.*, *supra*, common carriers, and, as such, are bound to exercise more than ordinary skill and precaution, in order to insure the safety of passengers upon their trains.

The question of the plaintiff's alleged contributory negligence was fairly submitted to the jury, and the finding upon that issue will not be disturbed in this proceeding. This case is, upon the evidence adduced, clearly within the rule recognized in the authorities above cited. The plaintiff's witnesses agree that the train in question was crowded to its utmost capacity, not only the space inside the cars, but the platforms of the motor and trailer. It is further shown that the defendant was in the habit of permitting passengers to stand in the aisles, and upon the platforms of its cars; and that Mr. Lazarus, who at the date named was acting in the capacity of assistant superintendent or train dispatcher, was present, and personally gave orders for the starting of the overcrowded train. True, there was evidence tending to prove the presence of a printed card notifying passengers not to stand upon the platforms, but there was, on the other hand, evidence that the card

above mentioned was not posted until after the accident which resulted in the injury complained of. It is also claimed that the conductor protested against the appropriation of the platform by passengers, but upon that point also the evidence is conflicting, and, as we have said, sufficient to sustain the verdict.

Complaint is made of the exclusion of evidence to prove that the defendant's line of road is constructed upon private property. The purpose of the evidence offered was, if we understand the position of counsel, to prove that the defendant company is not liable as a common carrier. But that proposition is not, it seems to us, entitled to serious consideration. The defendant, by undertaking to transport passengers for hire between Courtland Beach and the city of Omaha, assumed the relation towards its patrons of a common carrier, and the character of its easement in the right of way is wholly immaterial. Vide Bouv. Law Dict. tit. "Common Carrier;" Id. Rap. & L. Law. Dict.

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Judgment affirmed.

NOTE.—See note to *Danville St. Ry. Co. v. Payne*, *post*.

JAMES E. WOOD, Respondent, v. THE BROOKLYN CITY
RAILROAD COMPANY, Appellant.

N. Y. Supreme Court, Appellate Division, Second Dept., May, 1896.

(5 App. Div. 492.)

ELECTRIC STREET RAILWAY—INJURY TO PASSENGER.

The provision of the General Railroad Law (Laws 1850, Chap. 140, § 6), that a railroad company shall not be liable for injuries to passengers while riding on the platform, does not apply to street railroads.

It is not contributory negligence *per se* for a passenger to ride on the foot rail of a trolley car, there being no room within.

If the condition of the car, or the position of a vehicle standing in a street, be such as to apprise the motorman that there is reasonable liability of collision, even though it may be occasioned by the movement of the vehicle, it is negligence on his part to proceed.

Case of this series cited in opinion, appearing in bold faced type: *McGrath v. Brooklyn, &c. R. Co.*, vol. 5, p. 422.

APPEAL by defendant from judgment of Supreme Court, Kings county, entered upon the verdict of a jury; also from order denying motion for new trial upon the minutes.

Morris & Whitehouse, for the appellant.

Elliott, Jones, Breckinridge & Dater, for the respondent.

CULLEN, J.: This is an action to recover damages for personal injuries. The plaintiff entered as a passenger upon an open car of the defendant, which was so crowded that he was obliged to ride on the step that runs along side of that class of cars. As the car was proceeding on its course along Flatbush avenue, a team of horses, drawing a truck, was being watered at a trough along the curb. The team and truck stood somewhat diagonally

in the street, the heads of the horses being at the trough and the rear end of the truck further out in the carriage-way. As the car passed the truck the plaintiff was struck by the tailboard of the truck, knocked to the ground and injured. While one of the witnesses for the plaintiff testified that the truck did not move when the car was passing, the weight of the evidence tends to show that the truck was backed somewhat during that time. The motorman testified that the truck backed, but did not state for what distance. The conductor testified that there were three or four feet between the car and the truck. One of the witnesses for the defendant said the truck went back a couple of feet and another that "it did back a little." At the close of the evidence the defendant moved to dismiss the complaint, both on the ground of the contributory negligence of the plaintiff and that no negligence had been established on the part of the defendant. The motion was denied and the defendant excepted. The denial of this motion presents the only question to be considered on this appeal.

The contributory negligence of the plaintiff was a question for the jury. In *Vail v. Broadway R. R. Co.* (147 N. Y. 377), the Court of Appeals definitely decided that the provision of the General Railroad Law of 1850 (chap. 140, sec. 46), that the company should not be liable for injuries to passengers while riding on the platform of a car, did not apply to street railroads. In *McGrath v. Brooklyn, Queens Co., etc. R. R. Co.*, 87 Hun, 310, it was decided that riding on the side steps of the cars, where the cars were so crowded as not to permit the passenger to obtain a place within them, was not negligence *per se*. To the same effect are *Clark v. Eighth Ave. R. R. Co.*, 36 N. Y. 135; *Ginna v. Second Ave. R. R. Co.*, 67 id. 596; *Nolan v. Brooklyn City & Newtown R. R. Co.*, 87 id. 63.

We think also that there was evidence tending to show negligence on the part of the defendant, and that it was

proper to submit that question to the jury. It may be conceded that, at the time the motorman sought to run his car past the standing truck, there was room enough for the car to have passed without striking the truck, but this does not necessarily establish that the motorman was free from fault. He was aware or should have been aware of the crowded condition of his car and that passengers were riding on the side steps. He was also bound to consider the possibility of at least slight movement in the position of the truck. The horses were being watered, and it is said to be a common fact that horses, as they have finished drinking, naturally back from the trough. One of the witnesses testifies that such was the case at the time of this collision. Therefore, if the condition of the defendant's car or the position of the truck was such as to apprise the motorman that there was a reasonable liability of collision, even though it might be occasioned by the movement of the truck, it was negligence on his part to have proceeded. The case, in this respect, seems to fall within the principle of *Seidlinger v. Brooklyn City R. R. Co.*, 28 Hun, 503, and *O'Malley v. Met. Street Railway Co.*, decided by this court at the April term (3 App. Div. 259). In the latter case a passenger was struck by the end of boards, carried in a vehicle which had been proceeding in advance of the car and then turned out of the tracks. It was claimed that the vehicle had completely cleared the track and subsequently backed on the car. We there held: "The proof showed that a due regard for existing circumstances called upon the driver to consider the liability of the wagon to be cut off in its passage on the narrow street, and forced back down the grade, which would inevitably bring it in contact with the car." That rule is equally applicable to the case at bar. The driver was bound to consider not only the existing position of the truck in relation to the car, but also the probability of that position being changed, so as to endanger the passengers.

The judgment and order appealed from should be affirmed, with costs.

All concurred.

Judgment and order affirmed, with costs.

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Note.—See note to *Danville Street Car Co. v. Payne*, post.

ANNIE A. GILMORE, Appellant, v. BROOKLYN HEIGHTS
RAILROAD COMPANY, Respondent.

New York Supreme Court, Appellate Division, Second Dept., June, 1896.

(6 App. Div. 117.)

ELECTRIC STREET RAILWAY—DUTY TO PASSENGER.

There being evidence that the plaintiff, while boarding one of defendant's electric cars, was struck in the cheek by a brake handle which the motorman had set so as to hold the car at rest, and had then left the platform; *held*, that a presumption of defendant's negligence arose, which it was called upon to overcome, and that the complaint was improperly dismissed.

APPEAL from judgment of City Court of Brooklyn, entered upon a dismissal of the complaint after all the evidence had been presented; also from order denying plaintiff's motion for new trial upon the minutes.

Rufus L. Scott, for the appellant.

Morris & Whitehouse, for the respondent.

WILLARD BARTLETT, J.: We think that this is a case in which a jury should be allowed to determine whether the defendant was or was not negligent, as charged in the complaint.

Near the Brooklyn terminus of the New York and

Brooklyn bridge is a car stand consisting of six tracks, upon which electric cars run for the special convenience of travel to and from the bridge. The plaintiff was injured, according to her statement, at this stand, while attempting to take passage in a car operated by the Brooklyn Heights Railroad Company, on the Greene and Gates avenue line. Her testimony in substance is, that the car came in and was brought to a standstill there, in readiness to receive passengers; that the motorman left the car and went outside toward the rear; that she, in company with a great crowd, tried to step in on the front platform, when the brake flew around and struck her on the cheek, whereupon a man caught her, took her into the car and gave her a seat, after which she remembered nothing until the car reached Franklin avenue; that she then realized for the first time that she had been hurt very much, finding that her dress was covered with blood and fearing that she had lost her eye; but that before leaving the car she was able to see its number, which she confidently declared was 904.

The defendant introduced evidence indicating that no such accident as that described by the plaintiff had ever come to the knowledge of the officers or employes of the railroad company. There was testimony to the effect that no car numbered 904 was used on the line at the time; while the conductor of car No. 905, which did leave the bridge at about the hour when the plaintiff says she was hurt, denies ever having seen her on the Gates avenue line or anywhere else that he can recollect. The motorman of car No. 905 was not called, the assistant to the general superintendent of the railroad company stating that he understood he was in Boston and that he could not get him.

For the purpose of this appeal, we must assume that the plaintiff was truthful and that her narrative of what had

occurred was substantially correct. Upon this assumption, the proof indicated that the motorman had left the brake on the front platform turned on tight, so as to hold the car in place, and that it was suddenly set free in some unexplained manner, as the passengers, including the plaintiff, were making their way into the car. In the prudent operation of a street railroad, such an occurrence, endangering the safety of those who accept the invitation which is held out to them to become passengers, is unusual, to say the least; and the circumstances bring the case within the rule that where the thing which causes an accident is controlled or managed by the defendant, "and the accident is such as in the ordinary course of things does not happen, if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care." *Scott v. London Dock Co.*, 3 Hurlst. & Colt, 596; *Bridges v. North London Ry. Co.*, L. R. 6 Q. B. 377, 391; *Mullen v. St. John*, 57 N. Y. 567; *Volkmar v. Manhattan Ry. Co.*, 134 id. 418.

It was the duty of the railroad company to exercise at least ordinary care to prevent injury to the plaintiff from any appliance which she had to pass upon the platform by means of which passengers were allowed and evidently expected to enter the car; and we think that the quick and violent motion of the brake handle, as described by the plaintiff, raised a presumption of negligence on the part of the defendant which the company was called upon to explain. The description of the brake and the manner of operating it suggest the probability that its forcible action may have been caused by the accidental contact of some of the incoming passengers with the handle or with the catch on the floor of the platform which worked into the ratchet at the lower end of the brake rod. But even if the accident happened in this way, there would still be the question whether prudent management did not require

that precautions should have been taken to prevent just such an occurrence.

The circumstances of the injury being such as to give rise to a presumption of negligence in the absence of a satisfactory explanation, it follows that the case should have gone to the jury. While the defendant gave evidence tending to overthrow the presumption, it was for the jury to pass upon the weight and effect of that evidence as a matter of fact, and the trial court could not pronounce it conclusive as matter of law. Furthermore, the credibility of the defendant's witnesses, who were in the service of the railroad company, was peculiarly a question for the jury. *Volkmar v. Manhattan Ry. Co.*, *supra*.

The judgment and order should be reversed and a new trial should be granted, with costs to abide the event.

All concurred.

Judgment and order reversed and new trial granted, costs to abide the event.

NOTE.—See note to *Danville St. Car Co. v. Payne*, *post*.

CINCINNATI STREET RAILWAY COMPANY V. CHARLES SNELL.

Ohio Supreme Court, Feb. 25, 1896.

(54 Ohio St. 197.)

INJURY TO PASSENGER ALIGHTING FROM TROLLEY CAR—CONTRIBUTORY NEGLIGENCE.

An electric street railway company owes to the passenger who alights from one of its cars, the duty of safe passage across its tracks at a street crossing without peril from the acts of the company.

While bound to anticipate that a car might come in the opposite direction upon the parallel track, he is not bound to anticipate that it would come at a dangerous rate of speed.

A traveler is not, as matter of law, guilty of contributory negligence for failure to look in each direction before crossing the track of an electric street railway.

Question of contributory negligence held improperly withheld from the jury.

Case of this series cited in opinion, appearing in bold faced type: *Newark Pass. Ry. Co. v. Block*, vol. 4, p. 523.

APPEAL by defendant from judgment of Circuit Court reversing judgment of Common Pleas in favor of defendant. Facts stated in opinion.

Paxton, Warrington & Boulet and *Kittredge & Wilby*, for plaintiff in error.

John W. Wolfe and *Thomas L. Mitchie*, for defendant in error.

SPEAR, J.: The ground upon which the Common Pleas directed a verdict was that the plaintiff's evidence disclosed contributory negligence of such a character as to preclude a recovery. In other words, the holding was that, as matter of law, the plaintiff was guilty of contribu-

tory negligence. If the plaintiff's conduct, as shown by the undisputed facts, left no rational inference but that of negligence, then the ruling was right, but, if the question of contributory negligence depended upon a variety of circumstances from which different minds might arrive at different conclusions as to whether there was negligence or not, then the ruling was wrong. This follows from the rule given in *Ellis & Morton Ins. Co. v. Trust Co.*, 4 Ohio St. 628. Applying the doctrine of that case, the motion involved an admission of all the facts which the evidence in any degree tended to prove, and presented only a question of law whether each fact indispensable to the right of action, and put in issue by the pleadings, had been supported by some evidence. If it had been, no matter how slight the evidence, the motion should have been denied, because it was the right of the plaintiff to have the weight and sufficiency of his evidence passed upon by the jury. But if he had failed to give evidence tending to establish any fact without which the law would not permit a recovery, he had nothing to submit to the jury, and a question of law only remained. We are aware that this rule is much criticised, and plausible arguments against its reasonableness have been adduced; but it has been followed uniformly, and should be applied until definitively overruled, or changed by legislation.

The plaintiff was himself bound to use ordinary care, such degree of care as men of ordinary prudence commonly use under like circumstances; care proportioned to the danger to be avoided, and the consequences which might result from want of it, conforming in amount and degree to the particular circumstances under which it was to be exercised. If all people exercised the greatest possible caution in approaching and crossing railroad tracks, accidents would be much less frequent than they are; but the law does not require extreme care. Such care, and such only, as ordinarily prudent persons could reasonably be

expected to exercise under the circumstances, is the full measure. In order, therefore, to judge whether or not a fair question was presented regarding plaintiff's contributory negligence, we must inquire into the circumstances as disclosed by the evidence he introduced.

The evidence showed that the company's road is operated on Eastern avenue, Cincinnati, a thoroughfare running east and west. It is a double track electric road, the space between the tracks being about three feet. The cars are wider than the track, extending about one foot outside the rail. Defendant in error, Snell, resided on the north side of the avenue, between Washington and Weeks streets, the block between these streets being about 800 feet in length. Near his residence, in front of a drug store, there was a flagstone street cross walk at which the cars were accustomed to stop to receive and discharge passengers. Snell had been a daily passenger on the road for a number of years, and was known, as also his residence and place of getting on and off, to the railroad conductors. On the day of the accident Snell was a passenger on an east bound car on the south track. As the car approached the crossing, the speed was slackened, to allow Snell to get off, but did not quite stop. He stepped off outside of the south track at the crossing, and turned north to go to the north side of the street, which required him to cross both tracks. As he neared the south rail of the north track he was struck by a west bound car and injured.

The evidence tended to show further that Snell had not observed the coming car before alighting, nor does it appear that he looked, while in the car, in the direction from which the other car was approaching. At some time, while crossing, he looked both east and west along the track, but the precise point from which he looked east is not clear. The conductor of the car on which he had ridden gave him no warning of the approaching car, nor

was any gong or other alarm sounded, or warning given, by the motorman in charge of the coming car. He was inexperienced, having been the driver of a milk wagon until two or three days before. On the same car there was an experienced motorman, who was on for the purpose of giving the new hand instructions. At the moment Snell was struck, the car was running about twenty miles an hour, on a down grade, and ran about one hundred feet before it could be stopped. The car from which Snell alighted was moving slowly east, and, had the other car been running at an ordinary rate of speed, Snell would probably have had, after he saw it, opportunity to avoid it, but the car moved so rapidly that, after seeing it, he had but time to throw up his hands and try to step back, when the car struck him.

The question presented for the court was, simply, Did the evidence establish, as matter of law, that Snell was guilty of negligence contributing to his injury? The place of the accident was a street crossing, used as such by the public, and recognized as such by the company. It was the duty of the company to keep in mind the right of pedestrians on that crossing, and especially its duty to observe the rights of its own patrons who were under a necessity of using that crossing in going from its cars to their houses. Ancient rights have not changed because new vehicles of travel have been introduced upon the streets, nor because a portion of the people who ride, being in haste to reach their destination, demand rapid transit. The streets remain for all the people, and he who goes afoot has the right, especially at a crossing, to walk to his destination. He should not be compelled to run, or to dodge and scramble, to avoid collision with vehicles. As a general proposition, drivers of vehicles have the same right to travel along the carriage way of a street that foot passengers have to walk there. There is no priority of right; so that the right of neither is exclusive. But it is

to be borne in mind that the injury by collision is wholly upon the side of the footman, and the right of personal protection which every person possesses, together with that moral and legal obligation to refrain from doing an injury to his person which is imposed upon all others, gives the foot passenger such a right at street crossings as to make it the duty of drivers of vehicles, whether wagons, wheels or cars, to so regulate their speed, and give such warning of approach, at whatever cost of pains and trouble on their part, as that the footman, using ordinary care himself, and barring inevitable accident, may cross in safety. Life and limb are of more consequence than quick transit. The vehicle man must not run down the pedestrian. The opposite doctrine appears to have found lodgment in many minds, and there seems a disposition to assume that a foot passenger has no right upon a public street as against a street car. Indeed, common observation seems to show that this belief controls the conduct of drivers of many conveyances, public and private. Too often there is a reckless disregard of human life and limb, and pedestrians are compelled, at their peril, to keep out of the way. As matter of law, it is as much the duty of the vehicle to keep out of the way of the footman, and especially so at crossings, as it is for the latter to escape being run over, giving due consideration to the greater difficulty of guiding and arresting the progress of the vehicle. The use of streets for railways is allowed only because it is considered not to be a substantial interference with their free and unobstructed use as highways for passage. So long, therefore, as there is no unreasonable interference with the public right of passage, railways in streets are lawful structures; but if operated upon the theory of exclusive right to their track, they become wrongdoers. *Cincinnati St. Ry. Co. v. Cumminsville*, 14 Ohio St. 523; *Citizen's Coach Co. v. Camden Horse R. Co.*, 33 N. J. Eq. 267; *Baxter v. Railroad Co.*, 3 Rob. 516; *Barker v. Savage*,

1 Sweeney, 288; *Railway Co. v. Block* 55 N. J. Law, 605; *Attorney-General v. Metropolitan R. Co.*, 125 Mass. 515.

Undoubtedly the footman must reasonably use his senses for his own protection, and if he knows of the approach of a vehicle, and, using his faculties, perceives that he cannot continue on without danger of collision, he may not rush forward regardless of consequences. He is not bound, however, to anticipate negligence on the part of drivers of vehicles, but has the right to assume that they will not be negligent.

In this case, if the evidence was to be believed, there was a total disregard of plaintiff's rights, a clear case of gross, culpable negligence. The company owed to the passenger who had just alighted the duty of permitting him to cross from its car to the opposite side of the street without peril of life or limb from the acts of the company; instead of which it sent its car down the grade at break-neck speed, without giving any warning, or taking any pains to avoid running him down. Snell, it is true, was bound to anticipate that a car might come on the north track, but he was not required to anticipate that it would come at such a dangerous rate of speed, for that would be presuming that the company would be negligent; and if, acting on the presumption that the company would not be negligent, he used such caution as men of ordinary prudence would have used, his own conduct did not preclude a recovery. Whether he did use such degree of care, we think, was a question for the jury. The evidence presented a case where different minds might reasonably reach different conclusions. We are not required to determine the question whether or not Snell was negligent. It is insisted that, in the best view of the case for the plaintiff, the evidence shows that he did not look to the east, for, while it may be that the verbal evidence tends to show that he did look in that direction, yet he could not have

done so, for, if he had, he surely would have seen the coming car; and that, as matter of law, it is negligence for one about to cross a railway not to look each way. Authorities are to be found giving apparent support to this proposition. The practice in some courts is for the court to direct a verdict whenever, in the opinion of the judge, the evidence would not warrant a judgment. And some of these decisions imply that the court has held persons about to cross a street car track to the same degree of care as would be demanded were he crossing a steam railroad. We think there is no just analogy between the right of a street railway running cars along a highway and the right of a steam railroad running its trains across a highway at grade, and that the rule of care incumbent upon one about to cross a steam railroad is hardly a fair one to be applied in all its strictness to street railways in cities, where a car that can be speedily stopped passes a crossing at frequent intervals, and where people necessarily cross the streets frequently and hurriedly. As remarked by GRAY, C. J., in *Lyman v. Railway Co.*, 114 Mass. 83: "The cases relating to injuries suffered by being struck by a locomotive engine at a railroad crossing afford no test of the degree of care required of the plaintiff in this case. The cars of the horse railway have not the same right to the use of the track over which they travel, do not run at the same speed, are not attended with the same danger, and are not so difficult to check quickly and suddenly, as those of an ordinary railroad corporation. A person lawfully traveling upon the highway is not, therefore, bound to exercise the same degree of watchfulness and attention to avoid the one as to keep himself out of the way of the other." Other cases in Massachusetts are to the effect that the fact that plaintiff's evidence does not show that he looked up and down the street before crossing is not, as matter of law, conclusive evidence that he was not in the exercise of due care, and that the

mere fact of not looking when one attempts to cross a railroad is not conclusive evidence of want of care. *Williams v. Grealy*, 112 Mass. 82; *Bowser v. Wellington*, 126 Mass., 391; *Shapleigh v. Wyman*, 134 Mass. 118. Whether such omission is or is not negligence depends upon the circumstances. *Railway Co. v. Block*, *supra*; *City Railroad Co. v. Robinson*, 4 L. R. A. 126; *Street Railway Co. v. Loehneisen*, 58 N. W. 535; *Shea v. Railroad Co.*, 44 Cal. 414; *Swain v. Railroad Co.*, 693 Cal. 179; *Driscoll v. Cable Railway Co.* (Cal.), 32 Pac. 591; *Thom. on Neg.* 396, note. We suppose the rule for street cars is the same as for other vehicles, and if the footman is required, in a crowded thoroughfare, to look up and down, and wait until all possibility of collision is past, it would be like sitting on the bank until the stream should run by; and there would be but few hours in the busy part of the day when it would be practicable to cross.

Whether looking eastward would have disclosed the coming car depends upon whether the preceding car would have obstructed the view, and this depends upon its location at the time Snell looked, if he did look. The evidence is consistent with the conclusion that he looked up the track, but that the receding car prevented him from seeing the approaching one, and that, as the former made some noise, his attention was not called to the rumbling of the latter. And it is not inconsistent with the conclusion that ordinary range of vision would probably have enabled him, without turning his head or eyes up the track, to see a car in time to avoid it, had the car been running at a safe rate of speed; and we think one so crossing could not be asked to extend his observation beyond that distance within which a car proceeding at a customary and reasonably safe speed would threaten his safety.

Taking the effect of the evidence as a whole, one thing which is tolerably clear is that, if the car had been running at a reasonable rate of speed, and proper warning had

been given, Snell would not have been injured. All else is in more or less doubt. The evidence pro and con, therefore, was to be weighed, and the tribunal for that purpose was the jury, not the court upon the motion.

The judgment of reversal was, we think, right, and the same is affirmed.

SHAUCK, J., dissented.

BURKET, J., concurs in the dissenting opinion.

NOTE.—See note to *Danville St. Car Co. v. Payne*, post.

GEORGE BARD V. PENNSYLVANIA TRACTION COMPANY.

Pennsylvania Supreme Court, May 23, 1896.

(176 Pa. 97.)

ELECTRIC STREET RAILWAY—INJURY TO PASSENGER—CONTRIBUTORY NEGLIGENCE.

Plaintiff while riding, without the knowledge of the conductor, upon the bumper in the rear of and outside a trolley car, because the car was so full that he could not even find standing room on the platform, was struck and injured by a car coming up behind. *Held*, that the place being obviously dangerous, and exposed to the very danger which caused the injury, he was guilty of contributory negligence, as matter of law, and could not recover against the company.

A. S. Johns and B. Frank Eshleman, for appellant.

W. U. Hensel and H. M. North (J. Hay Brown with them), for appellee.

Per CURIAM: The appellant attempted to take passage on one of the cars of the defendant company. It was full to overflowing at the time, and there was no standing room in the car or upon the platform. The appellant

finally effected a lodgment of one foot upon the platform, and supported the other on the outside of it. In this position he held himself by means of the post at the outside corner of the platform, being directly against the outer end of the dash, or inclosure of the platform. An employe of the defendant came to the car to adjust the trolley pole, and to enable him to reach it, he required the appellant to leave the corner where he stood. He then moved to a position wholly outside the car, upon what is known as the bumper. The employe left the car on finishing his work at the trolley pole. It did not appear that any person having charge of the car had seen the appellant or had knowledge of his position. After he had ridden a short distance upon the bumper the car stopped to discharge some of its passengers, and while standing was struck by a car coming up in the rear, and appellant's foot was injured. Was it contributory negligence on the part of the appellant to take a position wholly outside of the car, and expose himself to the danger that overtook him?

It is argued that it was not, and reliance is put upon the *Street Railway v. Boudrou*, 92 Pa. 475, for the support of this position. But the plaintiff in that case was riding upon the platform of the car with the knowledge of the conductor.

This court declined to say that it was negligence *per se* on the part of a passenger to ride upon the platform of a street car. So in *Germantown Pass. Railway v. Walling*, 97 Pa. 55, the passenger injured was upon the front platform with the knowledge and assent of the conductor. This fact was set up as conclusive proof of contributory negligence, but we held that it was not enough. Standing alone, it was not *per se* proof of negligence. But in the case before us the alleged passenger was on the outside of the car, in an obvious place of danger, without the assent or the knowledge of the conductor; and he was injured by an occurrence that was a known danger incident to his

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position on the bumper of the car. The bumper was not for use by passengers for any purpose, but to relieve against the shock of just such an accident as happened. We think the learned judge was right in directing a compulsory nonsuit on the facts of this case, and the judgment is affirmed.

NOTE.—See note to *Danville St. Car Co. v. Payne, post*.

CHRIST REBER v. PITTSBURG & BIRMINGHAM TRACTION
COMPANY.

Pennsylvania Supreme Court, Jan. 4, 1897.

ELECTRIC STREET RAILWAY — INJURY TO PASSENGER.

Whether or not a company is negligent in running a trolley car at the rate of fifteen miles an hour, down grade and around a sharp curve, the platform being filled with passengers, is a question for the jury.

It is not contributory negligence as matter of law for a passenger upon a crowded trolley car to stand, by direction of the conductor, upon the rear platform, holding on to a rail behind him, so that he cannot recover against the company for injuries due to his being thrown from the car while it was rapidly rounding a curve of which he had knowledge.

APPEAL by defendant from judgment of Court of Common Pleas, Allegheny county.

A. W. Duff and W. F. Wise, for appellant.

W. J. Brennen, for appellee.

FELL, J.: The only question to be considered is whether the case should have been withdrawn from the jury. In considering this we must assume that the plaintiff has established these facts: Late at night he got on a crowded

car of the defendant company to go to his home. There was no room inside, and he stood with a number of other passengers on the rear platform. His position on the platform was a comparatively safe one, as he stood between the controller and the brake, facing forward, with his back against the railing of the platform. After riding some distance he was requested by the conductor, who desired to use the trolley rope, to change his position. He then attempted to enter the car, but because of its crowded condition was unable to do so, and he took a position which the conductor told him to take at the outer edge of the platform, near the step, and stood with his back to the car, holding with his right hand to the iron railing behind him. While he was in this position the electric current was turned off, causing the lights to be extinguished, and the car was allowed to run at the rate of 15 or 20 miles an hour down a grade in which there was a sharp curve. When the car struck the curve the plaintiff's hold of the railing was broken, and he was thrown off. It was the habitual custom of the company to carry passengers on the platform of its cars, and the plaintiff was there with the consent of the conductor, and was unable to get elsewhere on the car. The plaintiff was familiar with the locality, knew of the curve, and was aware of the danger of his position. The use of electricity as a motive power by passenger railway companies has created new conditions, from which new duties arise. The greater speed at which cars are moved increases the danger to passengers and to persons on the streets, and of these dangers all persons must take notice. When there is an invitation or permission to passengers to ride on the rear platforms, it is the duty of the company to observe a higher degree of care in the running of the cars at points where there is danger that they may be thrown off, and there should be a corresponding increase of care and vigilance upon the part of a passenger who voluntarily assumes such a position of

danger. In this case it was clearly for the jury to say whether there was negligence in running a car with the platform crowded with passengers at a high rate of speed around a sharp curve; and as it was not, under the circumstances disclosed by the testimony, negligence *per se* for the plaintiff to stand on the platform, the question of the exercise of due care by him in a position which he knew to be dangerous was also for the jury. These questions were submitted in a charge that was full and clear, and eminently fair and just to both parties. The learned judge pointed out to the jury the duty of the company to take into consideration the greater risk to passengers who by its invitation occupied the platform of the car, and told them, in substance, that it was the duty of the plaintiff to go inside the car if he could reasonably do so, and that if he chose to stand on the platform he was held to a high degree of care to avoid the known dangers of his position, and that he took all the risks of the position which were reasonably to be apprehended. The judgment is affirmed.

NOTE.—See note to *Danville St. Car Co. v. Payne*, *post*.

**RICHMOND RAILWAY AND ELECTRIC COMPANY V. REGINA
ELMORE BOWLES, BY HER NEXT FRIEND.**

Virginia Supreme Court of Appeals, April 2, 1896.

(92 Va. 788.)

ELECTRIC STREET RAILWAY—INJURY TO PASSENGER—EVIDENCE.

In an action for damages for injuries caused to a passenger on a car by the breaking of the trolley wire, *held*, proper to prove, for the purpose of charging the company with notice of its unsafe condition, that the same wire had broken frequently during the same season.

APPEAL by defendant below from judgment of Circuit Court of the City of Richmond.

The judgment was reversed for errors of procedure, the portion of the opinion relating to which is here omitted.

Wyndham R. Meredith, for the plaintiff in error.

Montague & Dawson, for the defendant in error.

KEITH, P., delivered the opinion of the court: This is an action of trespass on the case, brought in the Circuit Court of the city of Richmond, by Regina Elmore Bowles, who sues by Aubrey R. Rowles, her next friend, against the Richmond Railway & Electric Company, upon the following cause of action:

The defendant was a corporation, owning and operating a railway line along Clay and other streets in the city of Richmond, and the plaintiff was, on the 14th day of December, 1892, a passenger on one of its cars. Soon after taking her seat and paying her fare, the trolley wire used in operating and propelling the car broke, and fell from its usual and customary position above the car, and

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came in contact with the brake handle, which was attended with consequences so alarming, in appearance at least, and so apparently fraught with danger to the safety of the passengers, that the plaintiff, attempting to escape from a peril which seemed to be imminent, jumped or fell from the car, and received injuries, for which she sues.

In the first count she alleges that she was told by the conductor to jump while the car was running at a great speed, and that she was injured in attempting to obey his directions, while, in the second count, the allegation with respect to the conductor is omitted. In both counts the specific negligence stated consists in the failure of the defendant to provide adequate and proper trolley wires, machinery and other appliances for its business, and to keep the same in proper order and repair. She claims damages in each count for money expended in the treatment of the fractures, hurts and injuries sustained, for the pain she suffered, for the sums expended upon her maintenance and support, and for loss of time, aggregating the sum of \$6,000. The case was tried before a jury, and a verdict rendered in favor of the plaintiff in the sum of \$1,250, with interest from the 21st of November, 1893. The defendant moved the court to set aside the verdict and grant a new trial, which the court overruled, and the defendant excepted; and to this and other rulings of the court which took place during the trial the defendant filed four bills of exceptions. To the judgment rendered a writ of error and *supersedeas* was granted by one of the judges of this court.

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Objection was taken, during the course of the trial, to the ruling of the court in permitting Walter R. Smith to testify, as set forth in bill of exceptions No. 2. The accident, which is the foundation of the suit, occurred on the 14th of December, 1892, and the court permitted the plaintiff to prove by the witness Smith that, during the

fall of that year, this trolley wire had broken frequently. We think the evidence was properly admitted. It seems to involve at least a kindred proposition to that decided by this court in *Brighthope Railway Co. v. Rogers*, 76 Va. 443. It was there held that, employing an agency so powerful and dangerous as steam, a railway company is liable for all injuries caused by its omission to employ the best mechanical contrivances and inventions in known use, and that testimony was admissible to prove that the locomotive, which fired the wood on that occasion, had, on other occasions, emitted sparks and set fire to property along the railway, in order to show negligence and defects of machinery.

Electricity is an agency no less powerful and dangerous than steam and imposes equal obligations upon those who use it. The trolley wire is a contrivance essential to the use of electricity in the mode adopted by the defendant company, and the frequently recurring accidents which happened to the particular wire which is the subject of investigation in this controversy were quite sufficient to warn the defendant of its unsafe condition.

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NOTE.—See note to next case.

DANVILLE STREET CAR COMPANY v. MARY B. PAYNE.

Virginia Supreme Court of Appeals, April 16, 1896.

ELECTRIC STREET RAILWAY—DUTY OF COMPANY WHEN SNOW ON TRACK.

It is the duty of those in charge of electric cars to recognize the fact that a light snow upon the track renders the rails slippery and the control of cars more difficult; and to approach a down grade upon a track in such condition at such rate of speed that the car can be kept under control; and the company is liable for injuries to passengers due to failure in this duty.

APPEAL by defendant from judgment of Corporation Court of city of Danville.

Cabell & Cabell and Berkeley & Harrison, for plaintiff in error.

Peatross & Harris and A. J. Montague, for defendant in error.

BUCHANAN, J.: Mrs. Payne, the plaintiff in the court below, sued the defendant company for negligently inflicting injuries upon her while traveling on one of its cars as a passenger. Upon the trial of the case the defendant company demurred to the evidence, and the court gave judgment in favor of the plaintiff. To that action of the court this writ of error was obtained.

The evidence in the case shows that the plaintiff, on a cold evening in the month of January, 1893, became a passenger on one of the cars of the defendant company, to be carried something over a quarter of a mile. When the car had gone about one-half of that distance it attained an unusual rate of speed, failed to stop at the point where she was to leave it, of which the conductor had notice, and in

fact failed to stop at all from the time she got on the car until it ran a distance of about half a mile, when it came to a violent and sudden stop, thereby hurling her from her seat to the opposite side of the car, by which one of her ribs was broken, and other painful injuries were inflicted. The car, which was moved by electricity, was a double motor, equipped with safe and suitable appliances, in good order, and manned by a motorman and conductor, both of whom were experienced and competent. The track was in good condition, except that it was covered with a very light snow, which had fallen immediately before and during the time the plaintiff was upon the car, the tendency of which was, according to the defendant's evidence, to make the track slick, and to cause the wheels of the car to slide more easily when locked by the brakes. The car was running at an unusual rate of speed when it reached a curve in the road from which point there was a heavy down grade, when the motorman put on his brakes so as to be able to control it as it ran down the grade; but finding that, although the brakes locked its wheels, they did not check its speed, he attempted to reverse the current of electricity, but owing, it is claimed, to the snow and ice upon the track, and the fact that the wheels were locked, the current could not be reversed. The result was that he lost control of the car, and with locked wheels it rushed on down the slippery track with unabated, perhaps increased, speed, until the trolley broke, and, after going about 50 yards further, on an up grade, it came to a sudden and abrupt stop, causing the injuries sued for.

The counsel of the defendant admit that where an injury occurs to a passenger, and it appears that it was caused by a defect in the construction or equipment of the carrier's vehicle, or by anything pertaining to the service which the carrier ought to control, the presumption is that the injury was caused by the negligence of the carrier; and in order to relieve itself from liability for such

injury, it must show that it was the result of an accident which the utmost diligence, skill and foresight could not prevent. *Richmond & Danville R. Co. v. Morris*, 31 Grat. 200, 204; Booth St. Ry. Law. sec. 361.

But they claim that the evidence in this case shows that the defendant's car was in good condition, and properly equipped; its motorman and conductor competent and experienced; and its track in good condition, except so far as it was affected by the fall of snow. This slippery condition of the track produced by the fall of snow, they insist was such "an accident, act of God, or vis major" as relieved the defendant from liability for the injury complained of, which was directly caused by it, and which could not have been prevented by the utmost diligence, skill and foresight on its part.

A slight fall of snow in this climate in the month of January cannot be considered as an unexpected and extraordinary condition of the weather. On the contrary, it is usual and frequent, and the defendant was bound to anticipate and take into consideration all such weather as might reasonably be expected in the climate in which it was doing business, and the effect such weather would have upon its track.

The fact that there was a slight fall of snow immediately preceding the time when the car arrived at the heavy down grade, and became more difficult to control on account of the slippery condition of the track, caused by the snow, called for the exercise of the utmost diligence, skill and foresight on the part of the defendant. It saw that the snow had been and was falling. It knew what effect it would have upon its track. This is proved by the motorman and conductor on the car. It was its plain duty, therefore, to approach the point where the heavy down grade on the track commenced at such a rate of speed as would enable it to keep the car under control. Instead, however, of doing this, the evidence shows that the car was running

at an unusually rapid rate of speed, so much so that it was observed and commented upon. The result of this careless, and, under the circumstances, reckless, running of the car was that, when it reached the point where the heavy down grade commenced, the defendant had lost all control over it.

Other acts of negligence were relied on in the argument of the case, but it is unnecessary to consider them, as the injury complained of was clearly the result of the defendant's failure to exercise that degree of diligence, skill and foresight which the law imposed in the management of its car in the particular above referred to and discussed.

We are of opinion that the judgment of the trial court is plainly right, and must be affirmed.

NOTE 1.—The following is a partial abstract of the decisions made in the foregoing thirteen cases with reference to the duties of electric street railway companies to their passengers, and the care required of passengers to avoid injury:

DUTY OF COMPANY.—As a common carrier, is bound to more than ordinary care and skill to secure safety of passengers. *East Omaha St. Ry. Co. v. Godola*, ante, p. 424. Owes passenger alighting from car duty of safe passage across tracks at street crossings, without peril from its acts. *Cincinnati St. Ry. Co. v. Snell*, ante, p. 436. Although passenger negligently expose himself to danger, still company liable if negligent in failing to discover his danger or to avoid it when discovered. *Omaha St. Ry. Co. v. Martin*, ante, p. 417. Provisions of New York General Railroad Law exempting company from liability for injury to passengers riding on platform does not apply to street railway companies. *Wood v. Brooklyn City R. Co.*, ante, p. 429. Conclusive evidence of negligence to provide but one man to operate a car when the attention of one man at each end of car is required at certain points. *Redfield v. Oakland Consol. St. Ry. Co.*, ante, p. 395. Following acts held negligent: Motorman leaving platform with brake handle set so that it turned and struck passenger. *Gilmore v. Brooklyn Heights R. Co.*, ante, p. 432. Motorman to go to rear of car to adjust trolley, leaving front platform unattended, without first shutting off power. *Wood v. Brooklyn City Ry. Co.*, ante, p. 429. To run crowded trolley car around curve at such speed as to throw passenger down and off the car. *East Omaha St. Ry. Co. v. Godola*, ante, p. 424. To approach down grade on slippery track at such speed that car cannot be controlled. *Danville St. Car Co. v. Payne*, ante, p. 452.

DUTY OF PASSENGER.—Held contributory negligence *per se*: In spite of warning notice posted in car, to step on foot-board and stand with back to trolley post known to be there, in attempt to alight from rapidly moving car. *Maryland to use of Sharkey v. Lake Roland Elev. Ry. Co.*, ante, p. 412. To ride upon bumper of trolley car without knowledge of conductor. *Bard v. Pennsylvania Traction Co.*, ante, p. 444. Held not contributory negligence *per se*: To attempt to board slowly moving trolley car. *Cicero & Proviso St. Ry. Co. v. Meizner*, ante, p. 404; *Omaha St. Ry. Co. v. Martin*, ante, p. 417. To alight from slowly moving car. *Denver Tramway Co. v. Reid*, ante, p. 399. To ride standing on foot rail of trolley car, there being no room within. *Wood v. Brooklyn City R. Co.*, ante, p. 429. Or on the platform. *East Omaha St. Ry. Co. v. Godola*, ante, p. 424. Especially by direction of conductor. *Reber v. Pittsburg and Birmingham Traction Co.*, ante, p. 446.

NOTE 2.—In *McDonald v. Montgomery St. Ry.*, Alabama Supreme Court, May 21, 1896 (20 South. Rep. 317), held, proper to charge, in an action for injury to a passenger in alighting from a trolley car, that one alighting from a moving car assumes all the risks of alighting safely; also, that if he stood on the steps of a moving car when there was room to stand inside, he could not recover for injury caused by being thrown from the step by the motorman's negligence.

In *East St. Louis Elec. St. Ry. Co. v. Sliger*, Illinois Appellate Court, June 18, 1896 (65 Ill. App. 312), an action to recover for injury to a passenger by electric shock while entering a car, the court, in sustaining a judgment for defendant, say: "In damp weather the metallic parts of a car may become slightly charged with electricity by induction, and if appellant received a shock at all it was by stepping upon a metallic place thus charged. This condition of things had not existed under such circumstances and for such length of time as to affect defendant with notice of the fact."

In *Minerva Boikens v. New Orleans & Carrollton R. Co.*, Louisiana Supreme Court, March 9, 1896 (19 South. Rep. 737), in sustaining a judgment awarding damages to plaintiff for injury while alighting from an electric car, the court say: "Any person actually on the car, or in the act of getting off, is a passenger, and the company is charged with the duty of looking to his safety; and this involves the necessity on the part of the conductor of allowing the passenger time to get off the car. We are constrained to hold that a passenger who is violently thrown to the ground and injured by a car, too hastily set in motion, is entitled to damages."

In *Sias v. Rochester Ry. Co.*, New York Supreme Court, General Term, Fourth Department, December, 1895 (92 Hun, 140), plaintiff's intestate, riding on a trolley car, on a dark night, went out of the car, which was not full, and stood on the platform, with the tacit consent of the conductor. He leaned out a little and was struck by a tree which came within five or six inches of the car, and had been cut away in part to make room for cars to pass. Held, that the questions of negligence and contributory negligence should have been submitted to the jury.

In *Jagger v. People's St. Ry. Co. et al.*, Pennsylvania Supreme Court, March 22, 1897 (86 Atl. Rep. 867), *held*, that a street railway company is not bound by the practice of its employes of slowing trolley cars at a certain place to allow a passenger to alight. Whether or not it is contributory negligence *per se* to jump from a trolley car going four or five miles an hour is for the court to determine.

In *Vasele v. Grant St. Elec. Ry. Co.*, Washington Supreme Court, March 17, 1897 (48 Pac. Rep. 249), *held*, negligent for a motorman to stop and hold his car at a place where it is dangerous for a person to undertake to board the car. Whether or not the passenger is negligent in trying to board the car at such place is for the jury to determine.

MARY MAHONEY AND OTHERS V. SAN FRANCISCO & SAN
MATEO RAILWAY COMPANY.

California Supreme Court, December 17, 1895.

(110 Cal. 471.)

ELECTRIC STREET RAILWAY—DUTY TO TRAVELERS IN STREETS—CONTRIBUTORY NEGLIGENCE.

An electric street railway has no exclusive use of any portion of the highway. Travelers have a right to presume that it will use its franchise in view of their rights. If the electric light is liable to go out by reason of the trolley leaving the wire, other lights should be provided. If its light is not sufficient to reveal an obstruction in time to stop the car when moving at a given speed, it should move more slowly.

Held, not contributory negligence as matter of law for persons driving in a carriage, on a dark and foggy night, having the track of an electric railway on the one hand and a gulch on the other, to get upon the track even though there was sufficient space to drive clear of the track and they took no pains to avoid it.

Shea v. St. Paul City Ry. Co., 4 Am. Electl. Cas. 481, followed.

APPEAL by defendant below from judgment of San Francisco Superior Court.

The judgment was reversed upon errors in respect to the conduct of the trial and instruction to the jury.

Henley & Costello, for appellant.

Crittenden, Thornton, F. H. Merzbach and Garber, Boalt & Bishop, and J. F. Riley, for respondents.

TEMPLE, J.: This action was brought by the widow and six children of Florence Mahoney, deceased, to recover damages for his death, which they allege was caused by the negligence of the defendant.

A verdict of ten thousand dollars was rendered, and this appeal is taken by the defendant from the judgment, and from an order refusing a new trial.

The defendant was engaged in operating a street railway on which cars were propelled by electricity, by the overhead or trolley system. The accident occurred on the Old Mission road—a public highway—within the city and county of San Francisco, at about 10 o'clock, upon a dark and foggy night. Deceased and three companions were driving along on the highway, and took no pains to keep clear of the track, although there was sufficient space to enable them to do so. The driver testified at the trial: "The road was plenty wide there. There was plenty of room to keep away from the track. I kept closer to the track than the gulch, to be sure. I could not tell when I would strike a boulder in the road. I did not drive far enough from the track to clear the car, my intent was to clear the ditch on the right hand side, without reference to the track. I did not aim to keep clear of the track at all. I depended upon the lights coming along, so we could see it or hear something, and then turn out of the way. I intended to rely upon hearing or seeing. I did not stop at any time to look or listen, for the reason I had people behind, and depended upon them. The noise of the vehicle and of the wind might to some extent interfere with my hearing an approaching car, but still we did not stop."

The road at that point was descending at the rate of about two hundred and ninety feet to the mile in the

direction in which the party was traveling. Defendant's car coming up behind was proceeding by gravitation down the grade at a rate variously estimated as from ten to twenty miles per hour. It struck the wagon in which deceased and his companions were, killed the deceased, and very seriously wounded two others.

Appellant contends that the judgment should be reversed, because it was not shown that the deceased was without fault, and because it is so clear from the evidence that there was contributory negligence that no other rational conclusion can be drawn from it.

This contention cannot be maintained. The defendant had no exclusive use of any portion of the highway. Its right was to a use in common with the public, being peculiar only so far as its inability to move from its track made it so. Travelers upon the highway had a right to presume that it would use its franchise in view of the rights of others. If the light of the car was liable to go out because the trolley frequently jumps the wire, other lights should have been employed; and, if an obstruction cannot be seen by its light in time to stop the car, it should move at less velocity. Other travelers should use reasonable diligence to avoid obstructing the track, and it may be that, under some circumstances, a jury would be justified in finding it negligent for one to travel along the track; but it certainly is not negligence *per se*, and I see nothing in this case which would justify our reversing the verdict; on the contrary, I do not see how the jury could have found otherwise. The law applicable to [the matter is correctly stated in *Shea v. Portrero Railroad Co.*, 44 Cal. 414.

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NOTE.—See note to *Hall v. Ogden City St. Ry. Co.*, *post*.

AMANDA P. EVERETT ET AL. V. LOS ANGELES CONSOLIDATED
ELECTRIC RAILWAY COMPANY.

California Supreme Court, January 9, 1896.

ELECTRIC STREET RAILWAY.

It is contributory negligence, as matter of law, for a man of mature age, in good health, and in full possession of his faculties, having good eyesight and unimpaired hearing, to ride upon a bicycle upon the track of an electric street railway, in the same direction in which cars are accustomed to run on that railway, without looking or listening for the approach of cars.

The rule that one must look and listen before crossing the tracks of a steam railway applies equally when he is about to cross the track of an electric or cable railway.

The rule that the party causing the injury by his negligence may become liable in damages to the party injured, although the latter was himself negligent, applies only in cases where the person injured is in some position of danger from threatened contact of some agent under the control of the other party, when the former cannot and the latter can prevent the injury. It never applies where the negligence of the party injured continues up to the very moment of the injury or is a contributing or efficient cause of it.

The motorman of an electric car has the right to presume that a person traveling on the track in front of the car, to whom the customary warnings have been given, has made himself aware of the approach of the car and will either increase his speed or turn aside to avoid the danger which threatens him. Therefore, *held*, that the motorman was not guilty of negligence in not trying to stop his car until within ten or twenty feet of the traveler.

Cases of this series cited in opinion, appearing in bold faced type: *Carson v. Federal St. &c. Ry. Co.*, vol. 4, p. 470; *Creamer v. West End St. Ry. Co.*, vol. 4, p. 476.

APPEAL by defendant below from judgment of Superior Court, Los Angeles county. Facts stated in opinion.

John D. Pope, for appellant.

W. J. Hunsaker, for respondents.

VAN FLEET, J. : Verdict and judgment were for plaintiffs, and defendant appeals from the judgment and an order denying its motion for a new trial.

The action was by the widow and minor child of one Charles E. Everett, deceased, to recover damages for the death of the latter, caused by his being run over by an electric car operated by the defendant on its street railroad in the city of Los Angeles, and alleged to have been through defendant's negligence. At the conclusion of plaintiff's evidence in chief, defendant moved the court for a nonsuit, on the grounds, substantially, that the evidence wholly failed to show negligence on the part of the defendant, but did establish affirmatively that deceased came to his death through his own negligence, contributing directly and proximately thereto. The court denied the motion, to which ruling the defendant excepted, and this exception constitutes the only material question in the case. The evidence in behalf of plaintiffs tended to show that the deceased, at the time of the accident resulting in his death, which was on October 17, 1894, was forty years of age, in good health, and in full possession of his faculties, having good eyesight and unimpaired hearing.

He was an experienced rider of the bicycle, had owned one of those vehicles three or four years, and used it every day. On the date in question, about one o'clock in the afternoon, or a little thereafter, deceased was on his bicycle, riding along McClintock avenue, in a suburb of Los Angeles, known as "University," on a portion of the street where ran a double line of defendant's railway, one line used for south bound and the other for north bound cars. He was going south at the time, and traveling at the rate of about six miles an hour. Following him, and going in the same direction on the south bound track, was a train of defendant's cars, consisting of an electric motor car and a trailer, heavily loaded with passengers going out to the race track. This train was running at its

ordinary rate of about ten miles an hour. When deceased was first observed by those on the train, he was between a block and a half and two blocks ahead of the train, and was riding between the rails of the north bound track.

He continued on this track for some distance, when he crossed over to the south bound track, apparently to avoid an approaching car going north, and continued on his course, riding between the rails of the latter track. At this time he was something over half a block in advance of the south bound train, but the latter was rapidly overtaking him; and when the north bound car passed him, which was at a point a short distance south of where the south bound train then was, passengers on the former, evidently noting the rapid approach of the train, called out a warning to deceased to apprise him of danger; and at about the same time, when the train was within from twenty to forty feet from him (the estimates of the witnesses varying on this point), the motorman on the latter rang his gong, and, together with several of the passengers, cried out to deceased to "get off the track," "look out," and other words of like import. These warnings, although distinctly heard by a witness standing on the street some four or five times as far from the train as deceased then was, were either unheard by him, or totally unheeded, as he was not observed to look back or turn his head or attempt to turn or increase the speed of his bicycle. Thereupon the motorman when within about ten or twenty feet of deceased, reversed the current and applied the brakes, and endeavored to stop the train, but did not succeed in time to avoid running deceased down; and he was struck by the motor and killed. At no time from the time he was first seen riding ahead of the train was deceased observed to turn his head or look back, until just as the train was upon him, when he partly turned his head, and turned his wheel a little to the right, but not sufficient to get out of the way. University is a settled

suburb of Los Angeles, laid out in blocks, crossed and intersected by public streets, and the point where deceased was killed was at the intersection of McClintock avenue and Thirty-seventh street. Deceased was not a resident of Los Angeles, but had been there for about a week, more or less, before the accident stopping, at the house of a relative on Thirty-ninth street, off McClintock avenue, south of Thirty-seventh street and the point where he was killed. During his sojourn he had been in the habit of riding back and forth to and from the city on his bicycle, and, when on McClintock avenue, would ride on the railroad tracks, as it was smoother for travel between the rails than on the outside, where the space was narrow and rough and a poor road for the bicycle, by reason of the condition of the street. At points on McClintock avenue the soil was sandy, and had receded somewhat from the rails, so as to leave the latter in places standing a little above the surface of the street; but what the condition was in this respect at or in the immediate vicinity of the accident was not made to appear. At the date in question, races were in progress at the race track, situated south of the scene of the deceased's death; and, owing to the increased travel, extra cars were being run by defendant, and at shorter intervals than at other times, but whether the train which killed deceased was an extra or running on regular time was not shown. The motor-man in charge of the train had been in the employment of defendant about two weeks. For the first ten or twelve days he was under instruction from an experienced motor-man, and was then put in charge of a motor, and had been so employed some four or five days at the time of the accident. The statements of the witnesses vary considerably as to how far the train was from deceased when the motorman commenced ringing his alarm gong. A number of them show no recollection on the subject, but, taken as a whole, the evidence tends strongly to indicate that the

gong was being sounded before the motorman and passengers commenced to call out to deceased to get out of the way. There is a like difference as to just when the brakes were applied, and whether the speed of the train was slackened any before the deceased was struck. The head end of the motor passed the point where the deceased was struck between twenty and thirty feet before the train came to a full stop, and the evidence tended to show that it could have been stopped in a shorter distance. There was also some evidence tending to show that the wind was coming from the southeast; at what velocity does not appear, but that it was calculated to deaden to some extent any sound in deceased's rear.

This is substantially the case made by the evidence in behalf of plaintiffs upon the points material for our consideration. It can scarcely be made a question in the case—indeed, we do not understand it to be seriously controverted—but that the conduct of the deceased under the circumstances narrated constituted negligence on his part in the highest degree, and such as, standing alone, would necessarily preclude a recovery for his death. In walking or riding along a line of railway where cars or trains are passing, or likely to pass, at short intervals, one, while in a position to be endangered by such vehicles, must pay attention to his surroundings, and employ his natural faculties, and exert due diligence to avoid such danger. He must listen and look to ascertain whether danger is threatened by his situation, and a failure so to do constitutes negligence *per se*. This principle is settled by a practically unbroken line of decisions in this and other States. One or two of the latest expressions upon the subject by this court, in cases where the rule is fully discussed and authorities cited, may be given as aptly stating and applying the doctrine. In *Kenna v. Cent. Pac. Railroad Co.*, 101 Cal. 26, it is said: "It is a fixed rule that it is the duty of any one when attempting to cross a

railroad track upon a highway to be vigilant, to look and to listen before attempting to cross, and a failure to do so is regarded as such negligence on his part as to preclude a recovery. *Glascoek v. Cent. Pac. Railroad Co.*, 73 Cal. 137. With greater reason does the principle of this rule apply to one who is traveling laterally along the route of a railroad, and knows that engines will soon follow. 'It is negligence for a person to walk upon the track of a railroad, whether laid in the street or upon the open field; and he who deliberately does so will be presumed to assume the risk of the perils he may encounter' ''—citing a large number of cases. In *Holmes v. So. Pac. Coast Railway Co.*, 97 Cal. 161, where the person for whose death it was sought to recover was killed while walking along the railroad track near a station, while waiting for the train which ran him down, and when it appeared that deceased did not look out for the approach of the train, which he could have seen in time to get out of the way, the court say: "A railroad track upon which trains are constantly run is itself a warning to any person who has reached years of discretion, and who is possessed of ordinary intelligence, that it is not safe to walk upon it, or near enough to it to be struck by a passing train, without the exercise of constant vigilance, in order to be made aware of the approach of a locomotive, and thus be enabled to avoid receiving injury; and the failure of such a person so situated, with reference to the railroad track, to exercise such care and watchfulness, and to make use of all his senses, in order to avoid the danger incident to such situation, is negligence *per se*. The following are a few of many cases which might be cited to sustain this proposition: *Harlan v. Kansas City & Northern Railway Co.*, 64 Mo. 480; *id.*, on rehearing, 65 Mo. 22; *Railroad Co. v. Depew*, 40 Ohio St. 121; *Kelley v. Hannibal & St. Joseph Railroad Co.*, 75 Mo. 138; *Glascoek v. Railroad Co.*, *supra*. Nor is there

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any distinction, in the application of this doctrine, between an electric or cable line operated upon the public streets of a city, and that of an ordinary steam railway operated upon the right of way of the corporation. While the deceased had the undoubted right to a reasonable use of the public street, notwithstanding its occupancy by defendant's tracks, he could not ignore or disregard the rights of the latter in the premises, nor neglect to take reasonable precautions for his own safety. If he chose to make use of the part of the street occupied by the tracks, it was his duty to look out for and endeavor to avoid the dangers incident to such use. In *Haight v. N. Y. Central Railroad Co.*, 7 Lans. 11, speaking of this rule, the court say: "It is said by counsel for plaintiff that, while this may be the rule in regard to steam railways, it cannot be applied to street railways." In *Carson v. Federal Street, &c. Railway Co.*, 147 Pa. St. 219, it was held that failure to look for approaching cars on the part of one about to drive across the tracks of an electric street railway company is such contributory negligence as will prevent his recovery for injuries received by colliding with a car. The court said: "If, by looking, the plaintiff could have seen and so avoided an approaching train, and this appears from his own evidence, he may be properly nonsuited." In *Ward v. Rochester Elec. Railway Co.*, 17 N. Y. Supp. 427, it appeared that the plaintiff's intestate was fatally injured while attempting to drive across a street railway track. There was evidence that, at any time before reaching the track, deceased, by a glance, could have informed himself of the approach of the car, but that he drove onto the track without looking in either direction. It was held that he was guilty of contributory negligence. In *Creamer v. West End St. Ry. Co.*, 156 Mass. 320, the Supreme Court of that State held that where a person stepped from a horse car at the junction of two streets, and immediately started to cross the track of an electric

road, without looking or listening, and was run over by the electric car running at the rate of fifteen miles an hour, there could be no recovery, because the deceased was not exercising due care. We see no more reason for applying the rule that one must look and listen before crossing the tracks of a steam railway than that one must look and listen before crossing a street car track upon which the motive power is electricity or the cable. See, also, *Bailey v. Market St. Cable Railway Co.* (No. 16,004, decided by this court December 10, 1895), 42 Pac. Rep. 914. When the evidence discloses a failure to take such reasonable precautions for one's own safety, it constitutes negligence in law, and is not a question to be submitted to the jury.

This brings us to the only other consideration arising: Does the evidence tend to show such negligence on the part of defendant, contributing to the death of deceased, as would in law authorize a recovery, notwithstanding the negligence of the deceased? We find nothing in the evidence to sustain this view. The case is not like one where the injured party is discovered in time lying or standing upon a railroad track, under such circumstances as to make it doubtful whether he can or will get out of the way; or where one is seen attempting, either on foot or otherwise, to make a crossing, or passing along or on its track over a bridge or narrow causeway, or in a deep cut or tunnel, where to turn aside would be either dangerous or impossible; or under other circumstances of similar character. In such instances it may be conceded that the driver of the engine or motor would not be justified in law in proceeding without effort to stop his vehicle up to the point of collision. Persons cannot be recklessly or wantonly run down on a railroad track, however negligent themselves, where the circumstances are such as to convey to the mind of a reasonable man a question as to whether they will be able to get out of the way. But the evidence

had no tendency to make such a case. Here the deceased was in full and open view of the approaching train for several blocks, and had perfect opportunity and ability to apprise himself of its coming. He was upon a swift and noiseless vehicle, which, as a matter of common knowledge, can be made with very little effort, under a rider of ordinary strength and experience, to attain a much higher rate of speed than that with which the cars were progressing, and which, furthermore, is susceptible, by a mere pressure of the hand, to turn aside instantly—in much less time, indeed, than a pedestrian could step aside—so as to completely avoid an object no wider than a street car. He was upon level ground, and, assuming that the surface was too rough or the space too narrow outside the railroad tracks for him to safely turn that way, there was nothing, so far as appears, to prevent his return to the other track or to the space between the tracks. In fact, he had but a few moments before crossed from one track to the other, to avoid a like danger, and had been seen to do so by the motorman on the train. Under these circumstances, we think it perfectly clear that the latter was justified, reasoning in the line we have suggested, in keeping on his course, and assuming that the deceased, obeying the most ordinary dictates of prudence, had made himself aware of the approach of the train, and would either increase his speed or turn aside in time to avoid the danger which threatened him. In *Holmes v. Railway Co.*, *supra*, it is said: "As the deceased was a man of mature years, and nothing to indicate that he was not able to take care of himself—as he was in fact—the engineer might reasonably believe that he knew of its approach, and would, in obedience to the ordinary instinct of self-preservation, move away from the track before being overtaken by the engine. *L. S. & M. S. Railroad Co. v. Miller*, 25 Mich. 279." See, also, *Campbell v. K. C., Fort S. & M. Railroad Co.* (Kan.), 40 Pac. Rep. 997. The motorman was not

required to assume that the deceased would continue his negligent conduct to a point which would endanger his life or limb, and it was not negligence in the driver, under the circumstances, to indulge the presumption that the deceased would get out of the way, up to the last moment. There is nothing in the circumstances to indicate any wantonness or recklessness on the part of the engineer, or that he did not take all the precautions to warn the deceased and to stop his train that would have been suggested to one more experienced, or to any other reasonable mind. But, were it to be conceded that the evidence disclosed a case tending to show negligence on the part of the defendant's servants, the plaintiffs could not recover under the circumstances of this case. The rule which renders a defendant liable for injuries, notwithstanding some negligence on the part of the plaintiff or the person injured, can only apply "in those cases where such negligence was the remote, and not the proximate, cause of the injury, that is, where the negligent acts of the parties are independent of each other, the act of the person injured preceding that of the defendant." *Holmes v. Railway Co.*, *supra*. In that case, quoting from *O'Brien v. McGlinchy*, 68 Me. 552, it is said: "But in cases falling within the foregoing description, where the negligent acts of the parties are distinct and independent of each other, the act of the plaintiff preceding that of the defendant, it is considered that the plaintiff's conduct does not contribute to produce the injury, if, notwithstanding his negligence, the injury could have been avoided by the use of ordinary care at the time by the defendant. This rule applies usually in cases where the plaintiff or his principal is in some position of danger from a threatened contact with some agent under the control of the defendant, when the plaintiff cannot and the defendant can prevent the injury. . . . But this principle cannot govern where both parties are contemporaneously and actively in fault, and, by

their mutual carelessness, an injury ensues to one or both of them." See, also, *Hager v. Southern Pac. Co.*, 98 Cal. 309; *Esrey v. Southern Pac. Co.*, 103 Cal. 541. The rule can never apply to a case where, as here, the negligence of the party injured continued up to the very moment of the injury, and was a contributing and efficient cause thereof; for it is apparent that, by the slightest care and effort on the part of the deceased, he could have put himself out of danger up to the last moment before he was struck.

Our conclusion is that the plaintiffs did not make out a case entitling them to recover, and that the refusal of the trial court to grant the motion for nonsuit was error. It may be added that an examination of the evidence on the part of the defendant serves only to strengthen the case as to the negligence of the deceased, and the absence of negligence on the part of the defendant, and makes it clear that the court should have granted defendant's request to instruct the jury to find for the latter. It follows that the judgment and order must be reversed, and it is so ordered.

We concur: HARRISON, J.; GAROUTTE, J.

NOTE.—See note to *Hall v. Ogden City St. Ry. Co.*, post.

JOHN S. MORRISSEY v. BRIDGEPORT TRACTION COMPANY.

Connecticut Supreme Court of Errors, June 25, 1896.

ELECTRIC STREET RAILWAY—DUTY TO TRAVELER—CONTRIBUTORY NEGLIGENCE.

An electric street railway company is not bound to so manage its cars that vehicles on its track, in full view of the motorman, shall not in any event be injured, however careless the driver of the vehicle may be. The driver of a vehicle which was partly on the track of an electric street railway, having heard the gong of an approaching car, and seen the car

coming at a rate of speed greater than his own, when he was 125 feet away, *held*, that it was his duty to drive off of the track without loss of time, and that his failure to do so was negligence contributing to his injury caused by the car.

Cases of this series cited in opinion, appearing in bold faced type: *Everett v. Los Angeles Consolidated Electric Railway Company*, vol. 6, p. 460.

Morris W. Seymour and Howard H. Knapp, for appellant.

James A. Wilson and Edward P. Nobbs, for appellee.

ANDREWS, C. J.: If the court required of the defendant a higher degree of care in the management of its car than the law imposes, or if the court required of the plaintiff's driver a lower degree of care in driving his wagon, so as to avoid a collision with the defendant's car, than the law requires, then in either case there is an error of law which may be reviewed by this court. The driver heard the gong of the approaching car, turned, and saw the car coming behind him at a rate of speed greater than his own, when he was 125 feet away. His wagon was partly on the track of the defendant. It was his duty to drive off the track without loss of time. He did not do so, but continued along on the track, where he knew he was in danger of being hit, and where the wagon was hit as soon as the car overtook him. This conduct was negligent. It was an omission to use ordinary care which contributed to the injury complained of, and precludes any recovery for that injury, unless the conduct of the motorman on the car obviated the effect of that negligence. It is true that the motorman did not lessen the speed of the car until the car was within 15 feet of the wagon. He might rightfully act on the presumption that the driver would drive off the track before the car reached him. *Andrews v. N. Y. & N. E. Railroad Co.*, 60 Conn. 293, 299; *Glazebrook v. West End St. Railway Co.*, 160 Mass. 239; *Everett v. Los Angeles Consol. Elec. Railway Co.* (Cal.), 43 Pac. Rep. 207. And he had no duty to slacken his speed until he

was made aware that the driver was not going to turn out. The wagon could have been removed from all danger in a less distance than the 15 feet, for there was nothing to prevent the driver from turning to the west, and into a place of safety. As soon as the conduct of the driver indicated to the motorman that the wagon was not to turn out of the way, the motorman did everything in his power to prevent injury. He did not rush upon the wagon. At no time was he reckless or wilful. He did nothing which relieves the plaintiff from the effect of the driver's negligence. *Birge v. Gardner*, 19 Conn. 507; *Rowen v. N. Y., N. H. & Hartford Railroad Co.*, 59 Conn. 364; *Cooley on Torts*, 674. The ruling of the court on this part of the case seems to assume that it is the duty of the defendant to so manage its cars that vehicles on its tracks, if "in full view" of the motorman, shall not in any event be injured, however careless the driver of the vehicle may be. We do not understand that the law affords any such immunity to the drivers of vehicles, or imposes any such duty on motormen. *Nolan v. N. Y., N. H. & Hartford Railroad Co.*, 53 Conn. 461, 472. We think there was error in holding that the negligence of the driver did not contribute to the injury. There is error, and the judgment is reversed. The other judges concurred.

NOTE.—See note to *Hall v. Ogden City St. Ry. Co.*, *post*.

CITY ELECTRIC RAILWAY COMPANY v. CHRISTINA JONES.

Illinois Appellate Court, May, 1895.

(61 Ill. App. 183.)

ELECTRIC STREET RAILWAY—INJURY TO TRAVELER.

The following facts appeared: An electric street car was operated in a city street, without a conductor, it being part of the duty of the motorman to collect fares. The motorman, after he saw that plaintiff was about to cross the street, without giving any signal, left the power and brake set so that the car ran faster than allowed by city ordinance, and went inside the car to collect fares. The attention of plaintiff, when about to cross the track, was diverted by a runaway team, and she did not look for the approaching car, by which she was struck and injured. *Held*, a clear case of negligence of the company, and that the plaintiff was not chargeable with contributory negligence *per se*.

H. W. Masters and *H. A. Wright*, for appellant.

Wallace & Lacey, for appellee.

Justice WALL delivered the opinion of the court: The appellee recovered a judgment against the appellant in the sum of \$2,500.

As she was walking across Water street, in the city of Decatur, a car in charge of the servant of appellant ran upon her, inflicting the injury complained of. It is urged that under the proof the jury were not warranted in finding that she was at the time in the exercise of ordinary care, and that her failure to observe the approach of the car was due to such neglect on her part as should prevent recovery. In determining this question it is proper to consider the speed of the car and whether any signal was given of its approach. The evidence tends to show that a person walking west on Marietta towards Water street, as she was, could see a car coming south on Water street, as

this was, for a considerable distance, far enough at any rate to have avoided the collision. There is no doubt of this. Certainly it was possible to have seen the car in time if she had been looking that way.

She was not so looking, but as she started across Water street, the evidence tends to show, her attention was attracted by a runaway team which dashed across Marietta street and struck a post, upsetting the vehicle. She was watching this and just then the car struck her. She was carrying a basket of clothes, and wore a sun bonnet which projected past her face, and perhaps interfered with her vision laterally to some extent.

She did not see the car or hear it.

It was moving, according to some of the testimony, at the rate of ten miles an hour, no signal being given—the motorman at the time being inside the car collecting fares.

Persons crossing a street in which a track is laid for the passage of electric cars may be presumed to know that such cars are to be expected at any time, from either direction, and yet it is not at all unusual to depend more or less upon the warnings that are given at street crossings. Cars move both ways, and to be perfectly safe one must look both ways and not depend upon hearing the signals, but probably very few persons comparatively do so.

Such caution is perhaps extraordinary. At any rate when one's attention is attracted by an unusual and frightful thing like a runaway it would hardly do to say that he was not exercising ordinary care if for a moment he omitted to look up and down the street for an approaching car.

All the plaintiff need prove is such care as ordinarily would have been exercised under the same circumstances. It is not probable that any ordinary person would have acted differently in view of the circumstances here shown.

Certainly the finding of the jury in this respect is not so

opposed to the evidence as to justify the Appellate Division in reversing their conclusion.

As to the negligence of the defendant little need be said. It appears that it was a part of the motorman's duty to collect the fares, and that after he left the switch on the north side of Marietta street, and after he had seen the plaintiff starting to cross Water street, he went in the car and was taking fares when the plaintiff's peril was discovered and brought to his notice by some passengers. He ran to his brake as quickly as possible, but was too late. No doubt he was running faster than allowed by ordinance when he left his brake; no signal was given, and for all practical purposes the car was running without his direction or control.

It may be said, without much question, that a motorman ought to be at his post all the time and it should be no part of his duty to collect fares. An electric car moving at the usual rate of speed along such a street, as in this case, should be under the constant guidance and control of the motorman, who should be always at his post to slacken speed and give warnings whenever necessary. No doubt this accident might have been avoided if the car had been so handled and managed.

We have no hesitation in saying that the proof shows a clear case of negligence on the part of the defendant, and in view of all the evidence that the verdict is responsive to the merits. Complaint is made that the court refused certain instructions, which are not set out in appellant's proof. The abstract does not contain any of the instructions given or refused on either side, though it states that some were given for plaintiff and for defendant, and some asked by the latter were refused. In such condition of the abstract we are not called upon, as has frequently been held, to consider the point so presented.

We have, however, turned to the record and read with

care the entire series, and are satisfied the appellant has no just cause of objection.

All that is material and proper in the refused instructions is contained and aptly stated in those given for defendant. The rule as to the degree of care on the part of the plaintiff and the degree of negligence on the part of the defendant, necessarily concurrent in order to support a verdict for the plaintiff, was clearly announced and repeated over and over, so that the jury could not have misunderstood the law applicable to the facts before them.

The judgment will be affirmed.

NOTE.—See note to *Hall v. Ogden City St. Ry. Co.*, post.

GALESBURG ELECTRIC MOTOR AND POWER COMPANY v.
DOLLIE MANVILLE.

Illinois Appellate Court, May, 1896.

(61 Ill. App. 490.)

ELECTRIC STREET RAILWAY.—FRIGHTENING HORSE.

If a motorman sees that a horse is frightened and danger imminent, it is his duty to refrain from sounding the gong and to stop the car; and to continue to sound the gong under such circumstances would be such wilful misconduct as would render the company liable for resulting injury.

But in the absence of such misconduct, the fact that a horse becomes frightened at the electric car and the sounding of its gong, and runs away, does not make the company liable.

FACTS stated in opinion.

F. F. Cooke, for appellant.

A. M. Brown, *J. E. Maley* and *Marsh & Robinson*, for appellee.

Mr. Justice HARKER delivered the opinion of the court: Appellee was very seriously injured in the runaway of a horse drawing a phaeton in which she and two other ladies were riding.

Claiming that the runaway was due to the negligent manner in which the motorman on one of appellant's street cars managed his car, whereby the horse became frightened, she brought this suit and recovered judgment for \$1,125.

The chief grounds on which appellant urges a reversal is that the verdict is against the evidence. It is the only one we shall discuss in this opinion.

The record shows that Broad street runs north and south, and is thirty-six feet wide between the curbs. Appellant's car track occupies five feet in the center, leaving a carriage drive of fifteen feet on either side.

From Grove street which crosses Broad at right angles, to North street, which also crosses it at right angles 800 feet further south, there is a slight down grade.

Just before the accident the ladies drove from Grove street into Broad, when they saw a car approaching, at some distance, from the north. They turned south and drove in front of the car upon the west side. After they had passed the middle of the block the horse became alarmed at the noise of the car and the sounding of the gong and began increasing his speed. Appellee's sister, who was driving, either lost control of the horse when they reached North street, or attempted to turn to the right, but the horse was going at such a rate of speed that the momentum carried them upon the curb at the south side of North street. The phaeton was partly tipped and the driver partly thrown out. She recovered her seat, however, but lost one of the lines. One of the occupants seized the remaining line (the right one) and pulled the horse across North street into a yard, where the phaeton

became cramped over and the ladies were thrown out, appellee sustaining the injuries complained of.

It is contended by appellee that the motorman, having full notice of the nervous and frightened condition of the horse, drove his car abreast of the phaeton and rang the gong so violently as to cause the horse to sheer to the right at North street and get beyond the control of the driver. Upon the part of appellant, it is contended that the driver, in order to avoid the car passing them, urged the horse forward and increased his speed, so that when she undertook to turn west at North street, the momentum was such as to carry the horse and phaeton upon the south curb, where she lost one line and the control of the horse.

A decided preponderance of the testimony supports the contention of appellant. We are clearly of the opinion that the car was at no time abreast of the phaeton and that the cause of the running of the horse and phaeton upon the curb was the effort to get to North street and turn down it before the car reached that point.

So far as the ringing of the gong was concerned, it was the duty of the motorman to ring the gong when he saw the phaeton with the back curtain down ahead of his car. It was his duty to so notify its occupants that they might make no effort to cross the track and that they might assume proper control of the horse. It was his duty to ring as a warning to others wanting to cross at North street. Of course, if he discovered that the horse was already frightened and danger was apparent, to continue to sound the gong would be such wilful conduct as to make the electric car line company liable. Under such circumstances, it is the duty of a motorman to cease sounding the gong and stop his car.

Appellant's car had the right of the street as well as the horse and phaeton. The mere fact that the horse became frightened at the electric car and the sounding of its gong, and runs away, does not make the car company

liable. There must be some misconduct on the part of the company's servant having control of the car. In this case a clear preponderance of the evidence shows that there was no misconduct on the part of appellant's motorman, and the jury were wrong in so finding.

There was no error of the court in ruling upon evidence or in passing upon instructions. Reversed and remanded.

NOTE.—See note to *Hall v. Ogden City St. Ry. Co.*, post.

RICHARD N. YOUNG v. CITIZENS' STREET RAILROAD COMPANY.

Indiana Supreme Court, Oct. 13, 1896.

ELECTRIC STREET RAILWAY—CONTRIBUTORY NEGLIGENCE OF TRAVELER.

It is contributory negligence, as matter of law, for one walking close to or about to cross the track of an electric street railway not to both look and listen for approaching cars.

Cases of this series cited in opinion, appearing in bold faced type: *McGee v. Consolidated St. Ry. Co.*, vol. 5, p. 462; *Blakeslee v. Consolidated St. Ry. Co.*, vol. 5, p. 486; *Fritz v. Detroit Citizens' St. Ry. Co.*, vol. 5, p. 480; *Carson v. Federal St. & Ry. Co.*, vol. 4, p. 470; *Hickey v. St. Paul City Ry. Co.*, vol. 5, p. 494.

McCulloch & Spaan, Christian & Christian and *R. A. Black*, for appellant.

W. H. Latta and *Miller, Winter & Elam*, for appellee.

MCCABE, J.: This was an action begun by the appellant against the appellee in the Superior Court of Marion county to recover damages alleged to have been sustained by the plaintiff through the negligence of the defendant. The defendant owned and operated an electric street railway on West Washington street, running east and west, in

the city of Indianapolis, Ind., extending west beyond White river, during the month of May, 1894. The line was double tracked in the middle of said street, 80 feet wide from property line to property line. The trolley wires conveying the electric power were hung on iron poles 18 feet high, 5 inches in diameter at the top of the ground, and 3 inches at the top of the poles, standing 125 feet apart equi-distant between the double tracks; such tracks being 4 feet and 10 inches apart. The gauge of the street railroad tracks was 4 feet and 8½ inches. There was a gang of men working for the Manufacturers' Natural Gas Company putting gas pipe into a trench dug about three feet north of and parallel with the north track of said street car line. The street cars ran west on the north track and east on the south track. One of the defendant's cars running east on the south track of said line on the 15th day of May, 1894, struck appellant, and inflicted the injury complained of. It seems to be conceded that the motorman was guilty of negligence in not sounding the gong, as it is called, on approaching the appellant, so as to warn him of danger. The car was going at the rate of speed of 10 to 12 miles an hour. For a distance of 200 feet west of the point of said collision the tracks descended 3 inches. Just before the collision, the plaintiff quit his work, and walked south, near to the north rail of the south track, opposite to where he had been working, and looked attentively to the west to see if any car was coming from that direction on the south track. He saw 400 feet west. There was a street car coming east. There was nothing to obstruct his vision, or prevent his seeing a car coming east on Washington street. After plaintiff walked to a point near the north rail of the south street car track, he turned and walked towards the east 25 feet. After he started to walk east along or near the north rail of the south track, until he was struck by the street car, he did not look to the west for an approaching car. The motor-

man did not see him, or give any warning. When he last looked west, the car was 528 feet west of him. After the plaintiff quit work, and before the collision, he listened for an approaching street car. There was nothing to prevent the plaintiff from hearing the approach of the street car with which he collided, before the collision, and he was not prevented from hearing it.

[The discussion of certain findings in the special verdict is omitted.]

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Our construction of the verdict is that it shows that there was nothing to prevent the plaintiff from both seeing and hearing the approaching car. And as was said in *Ohio & Miss. Railway Co. v. Hill*, 117 Ind. 61: "If a traveler, by looking, could have seen an approaching train in time to escape, it will be presumed, in case he is injured by collision, either that he did not look, or, if he did look, that he did not heed what he saw. Such conduct is negligence *per se*." And as was also said in *Cones v. Cin., Indianapolis, St. L. & Chicago Railway Co.*, 114 Ind. 330, that: "The law will presume that he saw what he could have seen if he had looked, and heard what he could have heard if he had listened." To the same effect is *Lake Erie & Western Railway Co. v. Stick*, 143 Ind. 449.

Counsel for appellant concede the rule as above stated to be well settled in this State, but contend that it is not applicable to street railroads. In all cases ordinary care only for one's own safety is required to exonerate him from the charge of contributory negligence; and it is also true that what is ordinary care under one set of circumstances might amount to negligence under a different set of circumstances. Ordinary care is such as a person of ordinary prudence exercises under the circumstances of the danger, to be apprehended. The greater the danger the higher the degree of care required to constitute

ordinary care, the absence of which is negligence. But it is a question of degree only. The kind of care is precisely the same. Merely because steam railroad trains are heavier, and more difficult to control than an electric street car on a street railroad, is no reason why a person on such street car line is excused from the duty of stepping off or away from the track on the approach of the electric car. In *McGee v. Consolidated St. Ry. Co.*, 60 N. W. Rep. 293, the Supreme Court of Michigan said: "The city authorities recognized the necessity of rapid transit, and limited the cars on that street to 15 miles per hour. These cars are heavy, laden with motors, and they cannot at once be stopped. They have no right to run down pedestrians, but those in charge have a right to suppose that pedestrians will not walk upon the track without looking to see if a car is coming. It is well known that these crossings are places of danger, and that cars do not stop at every crossing. Here the custom was to stop on the opposite crossing from where the plaintiff was. . . . He was bound to look both ways before getting on the track. It will not do to say that he acted prudently and carefully in looking before getting off the curb, and was, therefore, not bound to look again, because he saw no car coming from the north at that time. A car coming at 15 miles would pass a great distance while a pedestrian was going 13 feet 10 inches. The plaintiff was bound to look before stepping upon a place of danger." And so in this case, a car coming at a speed of 12 miles an hour could come a great distance while plaintiff was walking east along the track 25 feet, during which time he made no attempt to look west. And the Michigan Supreme Court, in the case named, further said: "It is said by counsel for plaintiff that, while this may be the rule [as to duty to look and listen] in regard to steam railways, it cannot be applied to street railways. . . . We see no more reason for applying the rule that one must look and listen

before crossing the tracks of a steam railway than that one must look and listen before crossing a street car track upon which the motive power is electricity or the cable. In this State it is well settled that persons passing over railroad crossings must exercise care. They must look and listen, and, under certain circumstances, must stop, before attempting to cross. Electric street car crossings are also places of danger. The cars are run at great speed on the street in question. The city ordinance permits it, and the rule must be that, before going upon such tracks, every person is bound to look and listen." To the same effect are *Blakeslee v. Consolidated St. Railway Co.* (Mich.), 63 N. W. Rep. 401; *Fritz v. Detroit Citizens' St. Railway Co.* (Mich.), 62 N. W. Rep. 1007; *Carson v. Federal St. &c. Railway Co.* (Pa. Sup.), 23 Atl. Rep. 369; *Hickey v. St. Paul City Railway Co.* (Minn.), 61 N. W. Rep. 893. We are, therefore, of opinion that the special verdict fails to show that the plaintiff was free from contributory negligence, and that the Circuit Court did not err in overruling appellant's motion for judgment in his favor on the special verdict, and did not err in sustaining the appellee's motion for judgment in its favor on the special verdict, and in rendering judgment in its favor upon such verdict. The judgment is affirmed.

NOTE.—See note to *Hall v. Ogden City St. Ry. Co.*, *post*.

MICHAEL McLAUGHLIN v. NEW ORLEANS & CARROLLTON
RAILROAD COMPANY.

Louisiana Supreme Court, Dec. 2, 1895.

(48 La. Ann. 23.)

ELECTRIC STREET RAILWAY—INJURY TO TRAVELER.

(Head-note by the court):

While it is held that it is the duty of those in charge of a car, at crossings particularly, to be careful and watchful, those who use street crossings must exercise a reasonable degree of care and watchfulness.

The motorman had a right to suppose that plaintiff's son would not, after warning, attempt to cross immediately in front of the car, at a distance too near to prevent the accident.

While no one should be held to a degree of care and caution beyond his years, a boy eleven years and four months of age cannot be relieved from the exercise of all care and prudence.

APPEAL by defendant from judgment of Civil District Court, Parish of Orleans.

Bernard Titcher and *R. L. Tullis*, for plaintiff, appellee.

John M. Bonner and *Henry P. Dart*, for defendant, appellant.

BREAUX, J.: Plaintiff claims damages caused by the death of his son, aged eleven years and four months, occasioned, he alleges, by the negligence of a motorman in charge of an electric car owned and operated by the defendant. In September of last year Michael McLaughlin, Jr., petitioner's son, was proceeding out of Melpomene street, in this city, driving a hoop with a stick or small rod he held in his right hand, and in so doing was crossing St. Charles avenue at its intersection with Melpomene street. While in the act of crossing the track of the

defendant company at this intersection, he was struck by one of the cars of the company, and carried a distance of several feet, crushing and lacerating his body. He survived about an hour, suffering excruciating pain and agony.

The testimony of the witnesses who saw the accident is conflicting regarding the sounding of the gong on the colliding car and giving the alarm, and regarding the cutting off of the electric power and attempting to stop the car by applying the brakes. It is also a question whether the boy stopped at all on arriving at the track of defendant or continued across, also as to whether he was facing towards the car or in an opposite direction when he was struck.

The first witness (who saw the accident) on behalf of plaintiff testifies that the boy was bent, and rolled his hoop; that it seemed a little heavy, and caused him occasionally to pause; that his face was in the direction of the advancing car; that he rolled the hoop near to the center of the track, immediately in front of and near the car, when the car struck him; that he was carried about thirty feet, and the car ran on about two lengths further; that as the car advanced upon the boy the motorman seemed dumbfounded and confused, and made no movement to prevent the accident.

At the time of the accident there was a passenger on another car ascending that met the colliding car about the center of Melpomene street. This passenger, as a witness, says that he saw the boy approaching the car track, and not seeing him cross the avenue after the car on which he was had passed, he immediately jumped off and ran back to the car they had just passed, and found the boy on the ground. He states that the rear end of the colliding car was about twenty-five feet below the boy.

A woman also testifies, who corroborates, in some respects, the testimony of the first witness. In other

respects her testimony was entirely at variance from that of other witnesses; for instance, she says that the boy had taken up his hoop, and hung it on his arm to go across the crossing when he was struck.

Without further comment than that in the main the other witnesses who testified for plaintiff agree with the testimony of these two witnesses, we take up the testimony for the defendant.

The only passenger who was in the car with the asserted offending motorman testified that at a short distance from the corner of Melpomene and St. Charles avenue he noticed a boy rolling a hoop, and that when the car on which he was arrived near the intersection of these two streets the boy stopped, at the same time the brakeman moderated the speed of the car; that, upon the boy stopping, he again loosened the brakes; a moment after, the car struck the boy as he was attempting to cross; that it was impossible to stop the car in time to prevent the accident.

This witness also testifies that it carried the little boy some twenty feet, after striking him, before stopping.

The motorman and the conductor of the car corroborate this witness. The plaintiff, in support of his charge that the motorman was an inebriate and incompetent, refers to the acknowledgment of this motorman, as a witness, that three years prior to the trial he was discharged from the police for drunkenness.

The witness added that he had not since indulged in drink to excess, and that while on duty he did not drink.

With reference to the inebriety charged, the question is whether or not the motorman's acts at the time of the accident came to the requirement of the care devolving upon him.

We are not inclined to accord the least indulgence to one under the influence of liquor while in the discharge of duty; in justice, however, the inebriate condition charged

cannot be assumed. The only evidence is that of the motorman, who denies that he drinks largely, and asserts that on duty he is always sober.

The inquiry relates to the motorman. The plaintiff insists that he was incompetent and derelict in the performance of his duty when his son was killed. The authority of *Railroad Company v. Gladmon*, 15 Wall. 401, 405, is greatly relied upon at the bar as applying to the facts of the case.

In the case cited the facts were that one of the drivers of the company, instead of looking at his horses, turned his face, and was conversing with some one near him, when a child seven years old attempted to run across the track in front of the horses. Before he got across he turned to come back again and was severely injured. The record showed no testimony but that of one witness, who mentioned the chief facts above stated, and testified "that if the driver had not been looking at his companion, he could have checked the horses in time to have prevented the accident. Here the facts, as shown by the weight of evidence, are that the boy came hastily and unexpectedly on the track, at a time when the car could not be arrested, under circumstances that the motorman could not control, with care, however watchful; in other words, that the car could not be brought to a stop speedily enough to prevent the accident.

The gong of the car was sounded by the motorman.

It is true that this fact is denied by several witnesses. The affirmative testimony of witnesses near the accident that the gong was sounded and alarm given, is, we think, entitled to weight and credence.

Witnesses for the plaintiff have found fault with the motorman, because, as they assert, he failed to timely apply the brakes, and turn down the controller.

The witnesses for the defendant were near the place of accident; their view was not obstructed by anything.

After weighing their testimony with all the attention we could command, we have concluded that its weight is with them, and that it sustains the defense.

It is true that children are to be held responsible for such a degree of care as may usually be expected of them, taking due account of their age, and the particular circumstances of each case. But it is equally true that no act constitutes negligence unless there has been a want of ordinary care upon the part of the person charged with negligence.

Judged by that test, we must conclude that the verdict allowed damages in error, and that justice requires that it be reversed.

It is, therefore, ordered, adjudged and decreed that the verdict and judgment appealed from be reversed, avoided and annulled, and there be judgment for defendant, rejecting plaintiff's demand at his costs.

NOTE.—See note to *Hall v. Ogden City St. Ry. Co.*, *post*.

SAMUEL G. FLEWELLING V. LEWISTON & AUBURN HORSE
RAILROAD COMPANY.

Maine Supreme Judicial Court, Feb. 24, 1897.

ELECTRIC STREET RAILWAY—INJURY TO TRAVELER.

(Official head-note):

Electric street cars have, in a qualified way at least, the right of way, as against persons traveling on foot or with teams and carriages, in the same manner as ordinary steam railroads have; and all such persons should carefully observe the movements of street cars, when likely to meet them, and leave them an unobstructed passage, as well as they reasonably can.

Great care must also be exercised by motormen and conductors, on the street cars, to see that no injury be caused by themselves to either persons or property. Street cars are granted very great privileges out of

the public right, and their treatment of the public must be reasonable in return; so that when a person or a team, through accident or misjudgment, or for any cause, is caught in any position of peril by coming in close contact with a car, it is the duty of those managing the car to use all possible effort to avoid collision or injury.

Any person driving a horse on the street, especially an unbroken or uncertain animal, should exercise very great care and caution so as to pass the cars safely. But he is not to be debarred from reasonable opportunities in a reasonable manner to exercise his horse, young or old, spirited or dull, in the presence of either stationary or moving cars, in order to accustom his horse to such sights and sounds as the running cars produce, if he can.

MOTION for new trial after verdict for plaintiff, in action for damages for personal injury and injury to property. While driving a young horse and when about to meet a trolley car, the horse showed symptoms of fright, and tried to sheer toward the sidewalk. To prevent this and avoid running over persons on the sidewalk, plaintiff reined the horse toward the track. The horse, terrified at the car, which was running rapidly and with a snapping and buzzing of the trolley wire, dashed suddenly across the track, in the face of the car, and a collision ensued, in which the injuries complained of were sustained.

W. H. Judkins, for plaintiff.

W. H. White and *S. M. Carter*, for defendant.

PETERS, C. J.: We apprehend that electric street cars have, in a qualified way, at least, the right of way, as against persons on foot, or traveling with carriages and teams, in the same manner as ordinary steam railroads have. And all persons passing on foot or traveling by the common methods on the highways should carefully observe the movements of the street cars, and leave them an unobstructed passage, as well as they reasonably can.

But great care must also be observed by conductors and drivers, or motormen, upon the cars, to see that no injury be caused by themselves to persons or teams. Street rail-

roads are granted very great privileges out of the public right, and their treatment of the public must be reasonable in return; so that when a person or a team, through accident or misjudgment, or for any cause, be caught in a position of any peril by coming in collision or close contact with the cars, it is the duty of those who are managing the cars to use all possible effort, by slackening the speed of a car or stopping it altogether, in order to avoid injury. If a horse driven by a traveler appears to be restive or refractory at the sight of a moving car, the movement of the car should be managed in such a way as to relieve, if possible, the traveler in his dilemma. For these reasons, as well as for the general safety of passengers within and persons outside of the cars, the rate of speed should be reasonable, according to circumstances.

The city ordinance of Lewiston limits the cars of this road to a speed of five miles an hour.

On both points to be considered, more especially on the second, the case in hand is a somewhat close one. The plaintiff contends that the car with which his horse and carriage collided was running at the time at an extraordinary and reckless rate of speed. This position of fact, as maintained by the plaintiff, is strongly contested by the defendant; and while there is much testimony bearing on this contention pro and con, we cannot very well assume the decision of the question ourselves, and determine that the jury committed a mistake. The implication of the verdict is that the unreasonable speed of the car caused or increased the fright of plaintiff's horse, thereby causing the accident by which the plaintiff received his very serious injury.

The more doubtful question, perhaps, is whether or not the plaintiff was himself guilty of some recklessness and carelessness which contributed in causing the injury. Any person driving a horse on the street, especially an uncertain and unbroken animal, when likely to meet a

car, should exercise very great care and prudence, so as to cope with the occasion with safety, and, if he fails to do so, he enters on a reckless experiment at his own risk. At the same time he is not to be debarred from reasonable opportunities, in a reasonable manner to exercise his horse, old or young, spirited or dull, in the presence of either stationary or moving cars, in order to accustom his horse to them if he can.

The horse driven by the plaintiff when he was injured was but four years old. But his driver was an experienced and fearless horseman, and he says that, during the 17 days he had owned him prior to the accident, he had been driven frequently by the cars without his showing any sign of fear or fright, and was a horse of good natural disposition.

The defense strongly urges that he could have and should have turned off into a cross street when his horse began to misbehave, and that in that way there was an easy opportunity to have avoided the collision, and the plaintiff explains his conduct in that respect upon his theory of the situation.

Although there is force in the position of the defense, still we hardly think we should overrule the implied finding of the jury on this point even, and so we, therefore, feel constrained, all things considered, to allow the verdict to stand.

Motion overruled.

NOTE.— See note to *Hall v. Ogden City St. Ry. Co.*, *post*.

**ROBERT MULLEN, ADMINISTRATOR, v. SPRINGFIELD STREET
RAILWAY COMPANY.***Massachusetts Supreme Judicial Court, October 18, 1895.*

(164 Mass. 450.)

ELECTRIC STREET RAILWAY—INJURY TO TRAVELER—CONTRIBUTORY NEGLIGENCE.

In 1893 there was no such general use of fenders upon electric street cars as to render a company liable for failure to use them.

A motorman has no reason to expect that anyone will jump from the rear end of a wagon as it is about to pass a car and step upon the track, and is not negligent for failure to watch for such occurrence.

A boy 10 years of age, riding in the end of a wagon, and being warned to look out for the car, who nevertheless jumps from the wagon immediately in front of the car and is killed, is guilty of contributory negligence which will prevent recovery by his personal representatives.

Case of this series cited in opinion, appearing in bold faced type: *Thompson v. Buffalo Ry. Co.*, vol. 5, p. 535.

APPEAL by defendant below from judgment of Superior Court, Hampden county. Facts stated in opinion.

J. B. Carroll (*W. H. McClintock* with him), for the plaintiff.

William H. Brooks (*W. Hamilton* with him), for the defendant.

KNOWLTON, J.: The plaintiff's intestate, Robert J. Mullen, a boy nine years and seven months old, with Joseph Rivers, another boy a little older, with whom he was not acquainted, was riding at the hind end of a grain dealer's business wagon along Chestnut street in Springfield. A single track of the defendant's electric railway was laid through the middle of the street. The driver sat on a seat at the forward end of the wagon, driving a single

horse, and he had no knowledge of the presence of the boys, who got upon the wagon without the permission of anybody. The plaintiff's intestate was on the wagon when Rivers first saw it, and they afterwards sat with their backs to the driver, and their feet hanging over the tailboard. Mullen was on the left hand side of the wagon, next the track, and there were empty boxes between the boys and the driver. As the team was going at an ordinary rate of speed, on the right hand side of the street, it met an electric car. The distance between the curbstone and the nearest rail of the track is given by estimate as eight or ten feet. Both boys were intending to go up Franklin street, Mullen to a school which he attended, and Rivers to the house of his uncle on that street. They met the car at Greenwood street, which is the next street to Franklin and very near it. The horse, which was not much accustomed to electric cars, shied a little, but was easily controlled. Either because they were so near the place where they were to turn from Chestnut street, or for some other reason, the boys jumped out, and the driver went on, without knowing, until long afterwards, that they had been upon his wagon. When they jumped, the electric car was very nearly opposite the horse's head. Rivers jumped on the right hand side of the wagon, and ran along to the right of the horse on the sidewalk, or between the curbstone and the wagon. Mullen jumped to the left of the wagon, went upon the track just forward of the car, and was run over and killed. The action is brought under St. 1886, c. 140, and the plaintiff contends that his intestate's life was lost through the negligence of the defendant, or the gross negligence of its servants or agents.

There is hardly more than a scintilla of evidence to sustain this part of the case. To show negligence of the corporation, he relies upon the fact that there was no fender upon the car; but the accident happened on June

2, 1893, and the evidence tended to show that, of the numerous corporations in the different parts of the State that had begun to run cars by electricity, the West End Street Railway Company, in Boston, was the only one that had then used any fenders upon its cars, and the defendant offered to show that the use of fenders by that corporation was then only experimental. It is hard to see how the motorman was in fault. The great weight of evidence was that the car was going at about four to six miles an hour, and there was nothing to indicate that it was going very much faster than that. The testimony was that the motorman did not see Mullen while he was on the wagon, and there is nothing to indicate that he did. He certainly had no reason to expect that anybody would jump from the hind end of a wagon just as it was about to pass the car, and step upon the track. Even if he was negligent, the defendant is not liable for his conduct in this action, unless he was grossly negligent.

But if we assume that there was evidence for the jury on this part of the case, we find no evidence of due care on the part of the plaintiff's intestate. Rivers testifies that, just before they jumped off, he told Mullen to look out for the car, and that Mullen heard him. If, being warned to look out for the car, he immediately stepped upon the track before it, he certainly was careless. He was a trespasser upon the wagon, and his conduct in stealing a ride, and in getting on and off the wagon when it was in motion, gives color to his conduct in going upon the track immediately before the coming car. When he left his father's house he was sent to school, and when he was next seen riding with this team he was at a considerable distance from the line of travel to the schoolhouse, coming from a point farther off. In going upon the track at midday without looking to see whether a car was coming, when the view was unobstructed, and he could easily have heard the car, he was far more negligent than

was the plaintiff in *Messenger v. Dennie*, 137 Mass. 197, and 141 Mass. 335. Messenger was a boy of about the same age as the deceased, and was riding upon a sleigh runner, and stepped off before an approaching team without looking, and it was held as matter of law that he was negligent. There are also other authorities which require us to hold that there was no evidence in the present case that the plaintiff's intestate was in the exercise of due care. *Hayes v. Norcross*, 162 Mass. 546; *Casey v. City of Malden*, 163 Mass. 507, 508; *Thompson v. Buffalo Railway Co.*, 145 N. Y. 196; *Hestonville Passenger Railway v. Connell*, 88 Pa. St. 520.

Exceptions sustained.

NOTE.—See note to *Hall v. Ogden City St. Ry. Co.*, post.

BRINTON P. ROBBINS v. SPRINGFIELD STREET RAILWAY COMPANY.

Massachusetts Supreme Judicial Court, Nov. 30, 1895.

(165 Mass. 80.)

ELECTRIC STREET RAILWAY—DUTY TO TRAVELERS—CONTRIBUTORY NEGLIGENCE.

The rule which requires a person approaching the crossing of a steam railroad to look and listen for approaching trains is not exactly applicable in the case of electric street railways.

It is not as matter of law negligent for a man who is deaf and blind to travel unattended in the streets of a city.

Testimony to the usual speed of a trolley car held admissible.

Cases of this series cited in opinion, appearing in bold faced type: *Ellis v. Lynn & Boston R. Co.*, vol. 4, p. 581; *Driscoll v. West End St. Ry. Co.*, vol. 4, p. 547; *Benjamin v. Holyoke St. Ry. Co.*, vol. 4, p. 517; *Creamer v. West End St. Ry. Co.*, vol. 4, p. 478.

APPEAL by defendant from judgment of Superior Court, Hampden county.

Action for damages for injuries by collision with trolley car.

It appeared that plaintiff was seventy-nine years old, blind in one eye and partially deaf; that while crossing from one side of the street to the other, with a horse and wagon, over defendant's track, the wagon was struck by a trolley car and he received the injuries complained of.

The following are the instructions asked by defendant, and refused: "(1) Upon the whole evidence, the plaintiff cannot recover. (2) If the defects in the eyesight and hearing of the plaintiff, which defects were unknown and unnoticed by the motorman, contributed directly to the plaintiff's injury, then he cannot recover. (3) If the plaintiff failed to look and listen, when by looking or listening, he could have perceived the approach of the car, and plaintiff drove in front of the car, and such failure to look and listen contributed directly to his injury, then he cannot recover, and the verdict should be for the defendant." The jury were instructed, *inter alia*, that "it cannot be said, as a matter of law, that a man who is deaf and blind has not a right to travel unattended on a street in the city."

J. B. Carroll and *W. H. McClintock*, for the plaintiff.

W. H. Brooks and *W. Jamilton*, for the defendant.

FIELD, C. J.: The questions of the due care of the plaintiff, and of the negligence of the defendant's servants, we think, were for the jury, on the evidence which appears in the exceptions. The first request for instruction was, therefore, properly refused. *Ellis v. Lynn & Boston Railroad*, 160 Mass. 341; *Driscoll v. West End Street Railway*, 159 Mass. 142. The second request ought not

to have been given in the form in which it was offered, and the instructions upon this part of the case were correct. *Neff v. Wellesley*, 148 Mass. 487.

The third request could not properly have been given as an absolute rule of law. The decisions of this court show that a distinction has been taken with respect to the duty to look and listen when crossing the tracks of a steam railroad, where a railroad train has the exclusive right of way, and when crossing the tracks of a street railway company in a public street, where the cars have not an exclusive right of way, but are run in the street in common with other vehicles and with travelers. The fact that the power used by the street railway company is electricity, instead of that of horses, has not been deemed by the court sufficient to make the rule of law which has been laid down concerning the crossing of the track of a steam railroad exactly applicable to a street railway. *Benjamin v. Holyoke Street Railway*, 160 Mass. 3; *Creamer v. West End Street Railway*, 156 Mass. 320.

It was in the discretion of the court to permit the witness Thayer to be recalled at the close of the defendant's testimony; and in view of the fact that some of the defendant's witnesses had testified that the car at the time of the accident was going at the usual rate of speed, we see no harm in permitting a witness to testify what that rate was, if there was a usual rate, and he knew what it was.

Exceptions overruled.

NOTE.—See note to *Hall v. Ogden City St. Ry. Co.*, *post*.

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GEORGE WHITE v. WORCESTER CONSOLIDATED STREET
RAILWAY COMPANY.

Massachusetts Supreme Judicial Court, Oct. 22, 1896.

ELECTRIC STREET RAILWAY—INJURY TO TRAVELER—RECIPROCAL DUTIES.

While ordinary vehicles must not unnecessarily obstruct the passage of electric cars, since the latter are confined to a track, they owe reciprocal duties to avoid collision. Neither has a right to assume that the other will keep out of the way at its peril.

APPEAL by defendant from judgment of Superior Court, Worcester county.

W. A. Gile and George H. Mellen, for plaintiff.

Charles C. Milton and Herbert Parker, for defendant.

HOLMES, J.: This is an action for running down the plaintiff. He had driven across the defendant's track from the right side of the road, in order to pass around a standing vehicle, which was in his way, and he was crossing back again to his proper side of the road, when his rear left wheel was struck by an electric car which came up behind him. According to the defendant's evidence, the accident was due to the plaintiff's stopping suddenly just in front of the car; but the plaintiff testified that he did not stop, but was driving continuously around the other vehicle. Other details of fact were in dispute.

The defendant asked for an instruction that, if the plaintiff had an unobstructed view of the approaching car, and there was nothing to prevent the plaintiff from turning off the track, the driver of the car had a right to assume that the plaintiff would seasonably turn off the track to avoid accident. This was refused, and we are of opinion that

the refusal was correct. We do not suppose that the instruction asked was intended as a proposition of fact based on the practice and experience of the community. In some parts of the State, at least, it is well known that drivers of vehicles wishing to cross a track assume that electric cars will look out for them at least as much as they look out for the cars. But we suppose that the request was intended to embody a statement of the rights of electric cars irrespective of practice, and to put street railways on very nearly the footing of steam railroads. Whatever may be the law as to the latter, there is a great difference between the two cases. Electric cars are far more manageable, and more quickly stopped, than trains upon steam railroads. Their tracks are in the highway, where all vehicles have a right, not merely to cross, but to travel. In view of the inability of the cars to leave their tracks, it is the duty of free vehicles not to obstruct them unnecessarily, and to turn to one side when they meet them; but, subject to that, and to the respective powers of the two, a car and a wagon owe reciprocal duties to use reasonable care on each side to avoid a collision. See *Galbraith v. West End St. Railway Co.*, 165 Mass. 572, 580. Neither has a right to assume that the other will keep out of the way at its peril, although the electric car has a right to demand that the wagon shall not obstruct it by unreasonable delay upon the track. If the jury believed, as they might, that the plaintiff did not know of the close proximity of the car, and that the motorman did see the plaintiff's wagon, and saw that he was proceeding in the ordinary way around an obstacle, and clearing the track with reasonable speed, they well might find that due care required the motorman to move slowly, or stop, until the plaintiff was out of the way. In *Glazebrook v. West End St. Railway Co.*, 160 Mass. 239, the plaintiff was coming towards the car, and the driver had a right to expect him to turn out seasonably, as there was nothing to prevent it.

Here, according to the plaintiff's story, he was turning off as quickly as he could, in order to regain his side of the way.

The defendant asked for a second instruction that, if the plaintiff was proceeding in his vehicle ahead of the car, and in a course outside of, but parallel with, the track, the motorman had a right to presume that the plaintiff would not turn upon the track, and under such circumstances the motorman is warranted in proceeding at the usual rate of speed. This also was refused. With reference to the undisputed facts in the case, it would have been misleading and incorrect. If anything could be said by a judge as to what the plaintiff might be expected to do, it would be that he might be expected to turn back to the right of the road where he belonged, and from which he had come just before. Even if no part of his previous movements had been seen, the right of the road was the part to which he naturally would tend.

Exceptions overruled.

NOTE.—See note to *Hall v. Ogden City St. Ry. Co.*, *post*.

SUSAN D. WATSON v. MOUND CITY STREET RAILWAY COMPANY.

Missouri Supreme Court, March 10, 1896.

ELECTRIC STREET RAILWAY—CONTRIBUTORY NEGLIGENCE OF TRAVELER.

A traveler, who seeing an approaching electric car, and knowing the danger, attempts to cross the track in front of the car, is guilty of contributory negligence which will bar his recovery although the persons in charge of the car may also have neglected their duties.

The rule that though one has negligently placed himself in a place of danger from a moving train or car, those operating it owe him the duty of care to avoid injuring him, and his previous negligence will not bar a re-

covery if injury results to him from neglect of such duty, presupposes a prior negligence of the person injured, the effect of which might be avoided by those in charge of the car. It does not exempt the person injured from the consequences of his own contemporaneous negligence, which is the immediate, direct and proximate cause of the injury.

APPEAL by plaintiff below from judgment of Circuit Court, St. Louis county.

Statement of facts by MACFARLANE, J.: Defendant operates a line of street railroad in the city of St. Louis, and runs cars thereon by electric power. A part of its line is on Ninth street, which runs north and south. On the evening of November 17, 1892, about half-past 5 o'clock, a train consisting of two cars, operated by defendant, while running north on Ninth street between Morgan street and Franklin avenue, struck and killed John L. Watson. This suit is prosecuted by plaintiff, as the widow of said Watson, to recover the statutory damages for the death of her husband, caused, as alleged, by the negligent management of the cars. The petition charges that at the time said Watson was struck and killed he was crossing Ninth street over the car tracks "a sufficient distance ahead of said car or train of cars to be seen, and was seen, by the agent, officer or employe in charge of said car or train of cars, or by the exercise of reasonable care could have seen him, and the danger to which he was exposed, in time to have stopped said car or train of cars, and not have injured him." This allegation follows the general charge of negligently running one of its cars or trains of cars against deceased, thereby killing him, and must be taken as the specific negligence charged. The answer is a general denial and a special plea, that the said deceased "directly contributed to the accident which caused his death by his own negligence and carelessness in running in front of, or against the side of, a moving electric railway train, after dark while crossing a street near the middle of the block." The reply was a general denial. At the close of plaintiff's

evidence, the court gave an instruction in the nature of a demurrer to the evidence and plaintiff took a nonsuit, with leave. A motion to set aside the nonsuit being overruled, plaintiff appealed.

J. R. Meyers and A. R. Taylor, for appellant.

E. S. Robert, for respondent.

MACFARLANE, J. (after stating the facts): Only three witnesses were examined by plaintiff, all of whom professed to have been eye witnesses to the accident. Their evidence on the vital issue—that is, whether the train could have been stopped, after deceased put himself in a dangerous position on the track, in time to have avoided striking him—was contradictory, and almost unintelligible. The evidence shows, with reasonable satisfaction, these facts: The train, composed of two cars, was running north on Ninth street, at the usual rate of about seven miles per hour. When about the middle of the block between Morgan street and Franklin avenue, deceased undertook to cross from the west to the east side of the street in front of it. He walked in a diagonal direction towards the northeast, and, when about stepping over the east rail, he was struck, and from injuries received afterwards died. The first witness, on examination in chief, testified that when deceased stepped on the track the cars were about 10 feet from him. On cross-examination he fixed the distance at 4 or 5 feet. The second witness testified in chief that he did not know how far deceased was from the cars when he stepped on the track, but his recollection was the distance was 15 or 20 feet. On cross-examination he thought the distance was 10 or 15 feet. He also testified that deceased “hurried to go round the street car.” The third witness testified in chief that the car was distant from deceased 18 or 20 feet when he went upon the track. On cross-examination he testified: “When he got on the

track, I think the car was 15, may be 12, feet from him; and that was when he gave the step on the track." He was asked if he did not testify "four or five" feet when examined before the coroner. He answered, "I say that now." When asked by the court what he now said the distance was, he answered, "I do not know." The witness acknowledged that he did not know "how much a foot was." These witnesses testified that they had seen cars stopped about the place of the accident. One fixed the distance in which they had been stopped at two feet, and another four feet, and the third at five or six feet. All the witnesses testified that the motorman who was in charge of the cars was looking before him. Two of the witnesses said deceased was walking at an ordinary gait; another, that he hurried to go round the cars. All testified that no signal of any kind was given, and that there was no headlight on the cars. The evidence established, however, that there was sufficient daylight for one to easily see the cars or a man across the street. In order to avoid the effect of the unquestioned negligence of deceased, plaintiff charges that defendant's employes failed to observe proper care after the peril to which he had exposed himself was known to them, or by reasonable care might have been known. The rule is thus invoked, which is well settled in this State, that, though one has negligently placed himself upon a railroad track in front of a moving train, those operating it owe him the duty of care to avoid injuring him, and his previous negligence will not bar a recovery if injury results to him from neglect of such duty. But to carry this doctrine to the length of saying that one who knowingly crosses the track of a railway in such close proximity to a moving train as to be struck thereby before he could cross would not be guilty of concurring negligence, would virtually abolish the law of contributory negligence altogether, and render nugatory a long and uniform line of decisions of this court. — *Boyd v.*

Wabash Western Railway Co., 105 Mo. 371, and cases cited. The rule first stated presupposes a previous, or, in point of time, a prior, negligence of plaintiff, the effect of which would be avoided by defendant. It does not exempt plaintiff from the consequences of his own contemporaneous negligence, which is an immediate, direct and proximate cause of the injury. "Where the negligent act or omission of the parties to the action were contemporaneous, or, what is to say the same thing, when the catastrophe is the result of concurring or mutual acts of negligence, the plaintiff cannot recover damages." Beach, Contrib. Neg. sec. 56. That deceased saw the moving train before going upon the track is demonstrated not only by the fact that it was close to him, and he "had eyes to see," but by the positive evidence that "he hurried to go round the cars." There is no evidence that the motorman in charge of the cars could have known that deceased intended venturing across the track until he got upon it. Deceased was not, then, in a situation of peril, which called for action by the motorman, until he went upon the track. When he stepped upon the track he knew, or should have known, that the cars would run upon him unless he was very quick in his movements, or unless their speed was checked. In the circumstances, no fair and just conclusion can be drawn but that the negligence of deceased was a direct, contemporaneous and proximate cause of his own death. In the face of known and imminent danger he took the risk of crossing the track, and though, in the moment of danger, the trainmen may also have neglected their duties, he must bear the consequences of his contributory negligence. The doctrine of comparative negligence is not recognized in this State.

There is no occasion to consider or endeavor to reconcile the conflicting and contradictory evidence in this case. Taking that most favorable to plaintiff's theory, the indisputable facts remain that deceased knowingly and negli-

gently undertook to cross the track in front of the train, and was struck by it in the attempt. These facts preclude a recovery. The judgment of the Circuit Court is affirmed.

All the judges concur.

NOTE.—See note to *Hall v. Ogden City St. Ry. Co.*, *post*.

STATE, CONSOLIDATED TRACTION COMPANY, PROS. V. EDMUND W. REEVES.

New Jersey Supreme Court, March 24, 1896.

(58 N. J. L. 573.)

ELECTRIC STREET RAILWAY—CONTRIBUTORY NEGLIGENCE OF TRAVELLER.

(Head-note by the court):

A person traveling with a horse and a vehicle on a street traversed by electric trolley cars has the right to make use of the tracks upon which such cars are propelled whenever the necessary and customary use of the street requires or permits him to do so; and it is not, *per se*, contributory negligence for him to turn off from one track into and upon the other track, in a street in which double sets of tracks are laid, to allow a car to pass, if while so doing or whilst he is endeavoring to turn back again, he is struck by a car running upon the other track. The fact that he turns to the left to allow the car to pass is not, of itself, contributory negligence.

Case of this series cited in opinion, appearing in bold-faced type: *Newark Passenger Ry. Co. v. Block*, vol. 4, p. 523.

ON *certiorari*.

Warren Dixon, for the defendant.

George G. Tennant, for the prosecutor.

LIPPINCOTT, J.: This writ of *certiorari* removes into this court for review a judgment in the Court of Common

Pleas of the county of Hudson, on an appeal from the District Court of Jersey City. The plaintiff below recovered a judgment against the defendant, who is the prosecutor of this writ, for damages resulting from a collision between an electric trolley car, and his horse and wagon, on one of the streets of Jersey City. The prosecutor took an appeal to the Court of Common Pleas. A trial *de novo* under the statute was had in that court, and judgment for the damages to the horse, wagon and harness was rendered in favor of the plaintiff below against the prosecutor, who alleges error in the conduct of the trial, to remedy which he brings this *certiorari*.

The defendant in the action, at the close of the proof on the part of the plaintiff, moved for judgment of nonsuit on the grounds—*First*, that the plaintiff had failed to establish the incorporation of the defendant or that the car which collided with the horse and wagon of the plaintiff was a car belonging to the defendant company; and *secondly*, that the plaintiff had failed to establish negligence of the defendant as a cause of the accident and injury; and *thirdly*, that the driver of the horse and wagon, who was the servant of the plaintiff, was guilty of negligence contributing to or causing the accident and injury.

It is evident from the conduct of the trial that the first contention cannot be urged upon the consideration of this court. The evidence on the part of the plaintiff is sufficient to establish, *prima facie*, the corporate existence of the defendant company, and also that it operated the car which came into collision with the horse and wagon of the plaintiff. Besides these, elements of recovery clearly appear in the evidence adduced on the part of the defendant after the refusal of the trial court to nonsuit the plaintiff.

There was no denial in the case of the incorporation of the defendant company, nor that it operated the car in

question. The plaintiff was left to such proof as he chose to make on these points, and the evidence is such as to justify the trial court, acting in conformity with established rules of law, in refusing a nonsuit on these grounds. These reasons for reversal do not appear to have been urged on the hearing of this *certiorari*, either in the argument or the briefs of counsel.

The other two grounds above stated, upon which the motion for nonsuit was based, and also upon which the defendant requested the direction of a verdict in its favor, have led to an examination of the evidence in the cause, not for the purpose of settling contradictory or disputed evidence, but to ascertain whether there exists any proof which will reasonably and legitimately sustain the trial court in its submission of the case to the jury for their determination.

The facts, as they appear in evidence on the part of the plaintiff, show substantially that, on December 22, 1894, one George Reeves, a brother and employe of the plaintiff, was driving a horse and wagon of the plaintiff, on Newark avenue, in Jersey City, on what is known as the "up track" of the defendant company. It appears, in the evidence of the plaintiff, that Reeves was driving on the tracks because there were banks of snow on either side. A trolley car was behind him, and it sounded the gong as a notice or warning to him to turn off the track to allow the car to pass. The defendant company has two sets of tracks on Newark avenue, and he turned his horse off and into or upon, or partly upon, what is known as the "down track." The double tracks are quite close to each other. The car which was behind him passed him, and he was about to turn back again when he was prevented by a wagon coming on the up track, just behind the car. He had swung his horse around to get back, when, at that moment, he saw a car coming on the down track, and he shouted at the motorman, but the car came on, and

collided with the horse and wagon. It appears that Reeves did not have time to go across the track and get off on the other side. It also appears that there was, on that side, quite a bank of snow. The car struck the shaft on the point, or somewhere between the point and the cross piece of the shafts. The wagon was thrown around, and the left shaft entered the side of the car, about three or four feet from the front platform. The evidence is that the car struck the horse and wagon with considerable force. The wagon and harness were damaged and the horse injured. The evidence is quite clear that the driver had no opportunity of escaping the car or avoiding the accident. Several witnesses on the part of the plaintiff testify that the car was being propelled at a very high rate of speed, and that for quite a distance ahead, the motorman, if he was at all keeping a lookout, could have had the horse and wagon in plain view.

Many witnesses were sworn, and there was some variance in the evidence upon cross-examination. The evidence was in some dispute, but the above facts appear to have been proven by the plaintiff.

Under this proof the trial judge refused to nonsuit.

It seems to the court, here, on this review, that this refusal to nonsuit was entirely justified. It was not contended at all that the driver of this horse and wagon was not entitled to use any portion of this street, doing so with reasonable care and judgment with regard to the customary and lawful use of the street by the defendant company, with its cars, and others who were in the use of it. The general principle upon this subject has been well established since the decision in the case of *Newark Passenger Railway Co. v. Block*, 26 Vroom, 605.

It certainly was not, under these circumstances, within the province of the trial judge to take from the jury the question whether the motorman was guilty of negligence in operating this car along the street, causing this acci-

dent, and clearly it was not his duty to say to the jury that the driver of the horse and wagon was chargeable with such negligence, in the use of the street, as contributed to the accident and injury, and thus the plaintiff be debarred from any recovery.

Before the trial judge could so determine, the proof must have been so convincing to him that he could extract from it no other reasonable inference or conclusion. If the facts were such as that these questions remained in substantial dispute, then they must be submitted to the jury.

If, from the facts in evidence, two inferences or conclusions can be reasonably deduced, one favorable to the plaintiff and the other against him, a question then is presented which conclusively calls for the opinion of the jury. This principle is alike applicable to the question of whether negligence, as the proximate and sole cause of the injury, has been established against the defendant or not. *Pennsylvania Railroad Co. v. Matthews*, 7 Vroom, 531; *Bahr v. Lombard, Ayres & Co.*, 24 id. 233; *Railway Co. v. Block*, *supra*; *Metropolitan Railroad Co. v. Jackson*, 3 App. Cas. 193; *Bittle v. Camden & Atlantic Railroad Co.*, 26 Vroom, 615, 627.

Therefore, at the close of the evidence of the plaintiff, it became the duty of the trial judge to refuse the motion to nonsuit.

The evidence on the part of the defendant company was not of such a character as to require the trial judge, on the whole case, to direct a verdict in its favor. The evidence was calculated to contradict and refute the case made by the plaintiff and intensify the dispute and render it more clearly a question for the jury.

Upon a request for a direction of a verdict in favor of the defendant, the duty of the trial court is a plain one. The proof must be so clear that no other reasonable conclusion can be legitimately reached, before such a peremptory instruction can be given. No error is found in the refusal

of the court below to direct a verdict for the defendant. *Moebus v. Becker*, 17 Vroom, 41; *Railroad Company v. Shelton*, 26 id. 342; *Clark Thread Co. v. Bennett*, ante, p. 404; *Montclair v. Dana*, 107 U. S. 162; *Thomp. Tr.* §§ 2242, 2250.

One of the reasons in *certiorari* is that the trial judge erred in the admission of evidence. This reason has not been urged in the argument, and an examination reveals no such error.

The judgment of the Court of Common Pleas must be affirmed.

NOTE.—See note to *Hall v. Ogden City St. Ry. Co.*, post.

FRANCISCO BUTTELLI V. JERSEY CITY, HOBOKEN AND RUTHERFORD ELECTRIC RAILWAY COMPANY.

New Jersey Supreme Court, November 9, 1896.

ELECTRIC STREET RAILWAY—INJURY TO TRAVELER.

(Head-note by the court):

Street railway companies have no superior or predominant right to the use of the highways in which their cars run, over the rights of other persons passing on foot or with vehicles, except that, because of the inability of their cars to deviate from their track, other passers must give them the right to pass when occasion requires.

If a motorman running a trolley car on a highway in the day time perceives a person passing along on foot upon or closely beside the track, and apparently heedless of signals, and the motorman can arrest the movement of the car before striking the man, his failure to do so is evidence of negligence which must be submitted to the jury.

Questions of negligence of electric street railway company and contributory negligence of traveler held proper for the jury.

APPEAL by defendant from judgment on verdict for plaintiff.

William B. Gourley, for the rule.

Warren Dixon, opposed.

MAGIE, J.: The case shows that the plaintiff sought to recover damages in this action for an injury received by him as the result of a collision with a trolley car operated by defendant. A verdict having been obtained in favor of plaintiff, this rule was allowed. The argument in support of the rule is mainly put upon the ground that, if credence was given by the jury to the testimony of the plaintiff in respect to the circumstances under which he was struck by the car (and such credence was necessary before their verdict could have been reached), the verdict was erroneous, because such evidence conclusively established the negligence of plaintiff contributing directly to his injury. The evidence on behalf of plaintiff, if believed, established the following facts, viz.: That plaintiff had a proper occasion to travel along a public road in Hudson county upon which defendant's cars ran; that plaintiff's business lay upon the right hand side of the road in the direction in which he was going; that there was no sidewalk or path on that side of the road, but a ditch of considerable width; that the track of defendant on which its cars ran in the direction plaintiff was traveling was about two feet from the edge of the ditch; that plaintiff, who was a little deaf, walked either upon the track or on the space between it and the ditch, and while so walking, in broad daylight, and without any warning which he heard, was struck by one of defendant's cars, and received the injury for which he sought to recover. There was contradictory evidence as to the circumstances, but it had no such preponderating weight as to render a verdict finding that the circumstances were as above detailed unsustainable. The contention is that, if plaintiff received his injury under these circumstances, he contributed thereto by his own negligence. In my judgment, this contention is based upon a misconception.

tion of the rights of the defendant and of the duties of the plaintiff in respect thereto. It seems to be necessary to continually reiterate in this class of cases the well settled doctrine that street railway companies have not any superior and predominant right to the use of the streets in which they run, except in one respect; because their cars cannot deviate from their tracks, they have the right of way when they require it; and other passers on the highway, whether in vehicles or on foot, must give way to them. In other respects the rights of street railway companies in using highways with their cars are precisely like the rights of others who use the highways with other vehicles. As the highway is laid out for passage, each passer, whether in vehicles or on foot, has a right of passage, subject only to the condition that he does not unnecessarily and improperly interfere with such use by others as they are entitled to. The foot passenger on a highway has, doubtless, the right to use any part thereof. Whether his use is one which a prudent man would make must depend upon circumstances. When a certain portion of the highway is paved as a sidewalk, or otherwise set apart as a path for foot passengers, it may not be prudent to walk in the roadway set apart for vehicles. Where there is no part of the highway set apart for foot passengers, his right of passage permits him to use any part of the highway, subject only to the right of others therein. The peculiar right of street railways to require others passing on the highway to leave their tracks free for their cars to pass upon proper occasions obviously imposes on others the duty to leave such tracks free for passage upon observing or being informed that such passage is required. It plainly results that where, as in this case, there was no sidewalk or side path prepared for foot passengers, plaintiff had a right to walk upon any part of the highway. Whether it was prudent for him to walk upon a street railway, or in immediate proximity thereto, was a ques-

tion for the jury under the circumstances. He was a little deaf, and the track upon or near to which he chose to walk was that upon which defendant's cars ran in the direction he was going. This question must be considered with reference to the right of defendant. It had not the right to exclude him from its track within the public highway, but only the right to require him to remove from the track when he observed, or was notified, that one of its cars required to use the track. The question, then, is whether plaintiff, being a little deaf, acted negligently in walking along or near to the track. Whatever may be the rule in highways when a roadway for vehicles is set apart, the question must be settled with reference to the highway disclosed by the evidence as one in which vehicles and foot passengers must use the same portions of it. Since the duty he owed to the company was only to remove from the track when he perceived, or was notified, that such removal was necessary to the passage of a car, it is obvious that his act was not necessarily a breach of that duty, for he might assume that he would receive notice if his removal was necessary. The circumstance that he was deaf might make it more difficult for defendant to give him notice, but a deaf man is not debarred from the use of public highways, although he is held to such degree of care as a prudent man with his disability would take. Whether plaintiff took such care was plainly a question for the jury. Upon this ground there is no reason for disturbing this verdict. Whether, under the circumstances, plaintiff exercised proper prudence in walking where he did, and proper care in respect to the car of defendant, were questions for the jury, and we cannot say they were wrongly decided.

It is insisted, further, that upon the whole evidence the jury ought to have found defendant free from blame for plaintiff's injury. But, as has been stated, the jury might

have found the circumstances to have been those before stated, and upon those circumstances have judged it possible to acquit the motorman of defendant of gross negligence. For if he deliberately, in broad daylight, with full opportunity to perceive that plaintiff did not heed any signals of the gong, if it was rung, or any notice derived from the rumbling of the car, ran plaintiff down, and did him the injury complained of, it cannot be contended that such conduct was not negligent.

None of the other reasons assigned seem to have force, and the rule to show cause must be discharged.

NOTE.—See note to *Hall v. Ogden City St. Ry. Co.*, *post*.

CONSOLIDATED TRACTION COMPANY V. CHARLES LAMBERTSON.

New Jersey Supreme Court, November 9, 1896.

ELECTRIC STREET RAILWAY—INJURY TO TRAVELER.

(Head-note by the court):

When one attempts to cross a street railway track, in view of a trolley car about 300 feet away and coming in his direction at great speed, it is a question for the jury whether his act in attempting to cross under such circumstances was prudent or not, for he has a right to assume that the car is furnished with appliances to reduce speed and to stop, and with a motorman to make use of such appliances, and that the car will not continue to be run in violation of the law which limits the speed of vehicles using public streets to that which is compatible with the safe use thereof by other vehicles, and he is not bound to refrain from crossing for fear that the motorman will not make use of the appliances provided to reduce speed.

APPEAL by defendant from judgment of Circuit Court, Essex county, in an action brought to recover damages for injuries caused by collision of a trolley with a wagon, in the city of Newark.

Depue & Parker, for plaintiff in error.

Samuel Kalisch, for defendant in error.

MAGIE, J.: It is first argued that error appears in the refusal of the trial judge to nonsuit the plaintiff below. The claim is that, upon the evidence given by Lambertson, he was so clearly guilty of negligence contributing to his injury that the case should have been taken from the jury. Lambertson's narration of the occurrence may be summarized thus: He was driving in a public street, on which the trolley cars of the traction company ran, and turned his horse to cross one of the company's tracks, although he saw a car coming towards him, "as fast as it could," upon that track; the car being, when he started to cross, about 300 feet away. Although he had but a short distance to traverse, and his horse was going on a "little trot" the car struck his wagon between the front and hind wheels. The contention is that Lambertson, before attempting to cross the track, must have seen that the car was being driven recklessly, and at an excessive and illegal rate of speed, and that it was as imprudent to attempt to cross in front of it as it would have been to attempt to cross in front of a team of runaway horses. But the comparison is inapt, and it is plain that, if the jury believed Lambertson's story of the occurrence, there was a question for them in respect to his prudence or imprudence in crossing the track. The rights of Lambertson and the traction company to use the street for the passage of their respective vehicles were exactly the same, with a single exception. Because the cars of the company cannot deviate from the tracks, other vehicles must give way to them when there is occasion for them to pass. But neither Lambertson nor the company could drive their vehicles at a rate of speed incompatible with the safe and customary use of it by other vehicles or by foot passengers. Whether or not it must necessarily be inferred, from Lambertson's

statement that the car was moving "as fast as it could," that he must have known it was being run in an illegal manner, may, perhaps, be doubted. But, assuming such an inference must be drawn, it does not necessarily follow that he should have concluded that the car would continue to be driven in the same way. He who puts himself in the way of runaway horses who have escaped from the driver's control must know that he is taking a risk. But a jury may well say that he who crosses in front of a trolley car, provided with a motorman, may assume that he is furnished with the means of stopping or reducing speed. Then there was a question for the jury, in this case, whether a prudent man, upon such an assumption, might not judge it safe to cross in front of a trolley car 300 feet away, although coming at great and illegal rate of speed. Upon the assumption of the existence of means to reduce speed and to stop, and of a servant employed to make use of such means, it would be absurd to say that one was bound to refrain from crossing for fear the servant would not make use of the means.

NOTE.—See note to *Hall v. Ogden City St. Ry. Co.*, post.

THE CONSOLIDATED TRACTION COMPANY, plaintiff in error,
v. VIRGINIA A. SCOTT, ADMINISTRATRIX, &C., defendant
in error.

New Jersey Court of Errors and Appeals, June 15, 1896.

(58 N. J. L. 682.)

ELECTRIC STREET RAILWAY—INJURY TO TRAVELER.

(Head-note by the court):

A street railway company, propelling its cars by electricity along the public streets of a city, owes a duty to the public which requires it to so regulate the movements of its cars at the intersection of such streets,

when receiving or discharging passengers from a standing car, as not to unnecessarily expose pedestrians to the danger of collision with a passing car on the opposite track.

The rule requiring one to look and listen before crossing a steam railway, in order to be in the exercise of due care, does not apply with equal force to one crossing the track of a street railway in a city street where the company and the public stand on an equal footing in the use of the highway.

Cases of this series cited in opinion, appearing in bold faced type: *Dobert v. Troy City Ry. Co.*, vol. 6, p. ; *Newark Pass. Ry. Co. v. Block*, vol. 4, p. 523; *Shea v. St. Paul City Ry. Co.*, vol. 4, p. 481.

APPEAL by defendant from judgment of Supreme Court.

The omitted portions of the opinion relate to rulings and decisions upon questions as to contributory negligence of infants, damages, &c.

Warren Dixon, for the plaintiff in error.

Allan L. McDermott, for the defendant in error.

The opinion of the court was delivered by HENDRICKSON, J.: Virginia A. Scott, the defendant in error, brought suit in the Supreme Court against the Consolidated Traction Company, the plaintiff in error, in tort, for damages resulting from the death of her son, William Scott, a boy aged seven years and eight months, caused by being run over by a trolley car of the defendant below, in the city of Bayonne, on the 9th day of October, 1894. The suit was brought by the mother as administratrix of the son, for the benefit of the next-of-kin under the statute. The trial took place before Justice LIPPINCOTT and a jury, in the Hudson Circuit, and resulted in a verdict for the plaintiff below.

The matters for review brought into this court are alleged errors of the trial judge upon exceptions taken below upon his refusing, at the close of the plaintiff's case, to call the plaintiff, and order a nonsuit; and also upon his

refusal, at the close of the evidence on both sides, to direct a verdict for the defendant below; and also upon exceptions taken to the judge's refusal to charge as requested and to portions of the charge as delivered.

The facts of the case as developed by the evidence of the plaintiff below, briefly stated, were that plaintiff's son William, in company with his brother Horace, aged nine years, were returning home from a store to which they had been sent, and, in so doing, were passing along the north side of Center street, in said city, in a westerly direction, and were about to cross Avenue C, along which the defendant was engaged in running an electric street railway with double tracks, running from Jersey City to Bergen Point. The general course of the railway was from north to south. As the boys neared the northerly crossing of Center street over Avenue C, a closed car, on its way to Jersey City, approached on the north bound track and stopped two or three feet north of the crossing for the purpose of receiving and discharging passengers. While the car was so standing there, receiving passengers, the boys, with one other pedestrian, Mr. McFale, had reached the crossing in the rear of the standing car. Mr. McFale and the larger boy stopped, but the smaller boy, who was one or two feet back of them, walked on to the south bound track, where he was struck by a car from Jersey City and killed. Just before the car struck him, he was seen to make a sort of spring as if to get out of the way, but it was too late. The standing car obstructed the vision of those behind it from seeing an approaching car on the south bound track. The south bound car was traveling at the rate of six miles per hour, and had passed the rear of the standing car seven or eight feet before it struck the boy. The motorman at once reversed the car, which continued its motion to the south side of Center street, some thirty or forty feet, before it was brought to a standstill. The witnesses heard no sound of bell or gong from the approaching car, and there was no

evidence that the boy knew a car was approaching when he started to pass over from behind the standing car. The boy was familiar with the passing of cars to and fro on Avenue C, and had often passed over this crossing. While these may not be all of the facts shown, I think they are sufficient upon which to fairly consider the legality of the judges' rulings at the trial. Upon the facts proved, the defendant moved that the plaintiff be nonsuited on the ground that no negligence had been shown on the part of the defendant, and that contributory negligence had been proved on the part of the plaintiff's intestate. This motion the judge refused, and his refusal is now assigned for error.

Can it be said, as a matter of law, that, upon the facts stated, there was no duty laid upon the defendant at this public crossing to so regulate the action of its cars, as to rate of speed, the giving of signals, or otherwise, that pedestrians should be protected from unnecessary exposure to danger from collision with its passing cars? The counsel for the plaintiff in error, in his argument, admitted that the company might owe such a duty to a passenger who alighted from the north bound car, and had passed behind it in making his exit, by reason of its contractual relations with the passenger.

Indeed, it has been held that in an action for injuries to plaintiff's intestate while crossing defendant's car track, negligence and contributory negligence are questions for the jury, where it appears that the intestate, on alighting from one of the defendant's cars, passed behind it and attempted to cross the other track when he was struck by an approaching car, which was running at its ordinary speed, and there is no evidence that any signal or warning of its approach was given. *Dobert v. Troy City Ry. Co.*, 36 Suppt. 115.

In another case an instruction that the care required of

a street car company to persons upon its tracks is not that high degree of care which it is required to exercise towards passengers, was held to be incorrect when applied to a company running electric cars on city streets. *Dallas Rapid Transit Railway Co. v. Dunlap*, 26 S. W. Rep. 877.

It is well settled that at crossings street cars and pedestrians have equal rights to the use of the streets, and it has been held in that connection that what is proper care and precaution on the part of those in charge of cars, to prevent accidents, is a question of fact in each case. *Schulman v. Houston, W. S. & P. F. Ry. Co.*, 36 N. Y. Suppt. 439.

That such a duty towards pedestrians who are thus passing along the crossing of a public street traversed by a street car company becomes chargeable to the latter is emphasized by the fact that such crossings are necessarily and legally frequented by not only the adults but by the children of a town attended or unattended by older people, and that such duty becomes more or less exacting, according to the circumstances of each case.

The facts in the present case, to say the least, fairly raised a question for the jury, whether the defendant was in the exercise of due and reasonable caution when it permitted its south bound car to pass the standing car at that public crossing and at such a rate of speed under the circumstances. In forming a judgment upon that question, there were subsidiary questions, equally calling for consideration and judgment, such as—was it the duty of the motorman, in the exercise of due and proper care, as he approached the standing car which would obstruct his view of passengers or pedestrians who might be waiting to pass, to sound his bell or gong as a warning; and did he so sound his bell or gong; and should he have had his car under control at this crossing; and did he have it under such control when approaching the standing car? These facts and the inferences to be fairly

drawn from them, under the principle before alluded to, it seems to me, clearly, were matters for the jury exclusively, and that the trial judge was right in so submitting them and refusing to nonsuit.

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Another assignment of error is based on the exception to the refusal of the judge to charge that, "if plaintiff's intestate entered upon the south bound track, without first looking for an approaching car, the plaintiff cannot recover." While not charging this request in terms, the judge charged that if the boy himself was guilty of negligence or the want of reasonable care, which contributed in any degree to that result, there could be no recovery, and further, that "the rule is that, in crossing a street in which these cars are running, the pedestrian must exercise reasonable care to avoid injury to himself. He has no right to shut his eyes and walk across. He must use his senses, his eyes, his ears, and he must do that which reasonable, ordinary care requires of him; and it is a question for the jury to determine whether this boy was negligent there." He further charged that "being a boy of tender years, he is held only to that degree of reasonable care and caution which his age and capacity permit him to use and exercise." Further on, the judge charged that, if the boy "saw the car coming he was bound to use his eyes, to look to see that there was danger there and he could not go in front of it; and if he did, and accident and injury resulted to him, although the motorman may have been negligent, the defendant is held not liable in this accident."

It may be said with reference to this request to charge, that the proposition that one to be in the exercise of due care must look and listen before crossing a steam railway, is well established, but this duty does not apply with equal force to one in crossing the tracks of a street railway. *Newark Passenger Railway Co. v. Block*, 55 N. J. L.

605; *Lyman v. Union Railway Co.*, 114 Mass. 83; *Shea v. St. Paul City Railway Co.*, 50 Minn. 395; *Moebus v. Hermann*, 108 N. Y. 354.

In the case of *Shea v. St. Paul City Railway Co.*, *supra*, it was held that the failure to look up and down a street railroad upon a public street, before attempting to cross, is not, as a matter of law, negligence, as in case of crossing the ordinary steam railroad. And in *Moebus v. Hermann*, *supra*, the New York Court of Appeals held the same doctrine. It is a matter of common knowledge that the double tracks of street railways lie close to each other, and that, after emerging from behind the standing car, the plaintiff's intestate could have had but a step or two to take to reach the opposite track in front of the approaching car. And even if the boy had looked as soon as he passed this standing car, it is a question whether he could have saved himself from the impending danger. It may be that, without looking, the approaching car was within the range of the boy's vision, and that the spring he made in front of the car was under a sense of sudden terror that increased the hazard of his death. But it must be remembered that if a person placed by the negligence of another in a position of sudden danger, and, under the influence of great terror, does an act which may contribute to his injury or death, such contributory negligence is not imputable to him, and will not bar a recovery. Whart. Neg. 304.

I think, in view of the authorities named, and considering the extreme youth of the plaintiff's intestate, that the trial judge could not have properly charged this request, and thus held that, under the circumstances of this case, a failure of the plaintiff's intestate to look for an approaching car before entering upon the south bound track would be negligence *per se*, that should bar a recovery; and I think the judge's charge upon the subject

of that request as to the amount of care and watchfulness required of the plaintiff's intestate under such circumstances was fully up to the standard exacted by the law.

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The judgment below should be affirmed.

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NOTE.—See note to *Hall v. Ogden City St. Ry. Co.*, *post*.

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CAMDEN, G. & W. RY. CO. v. CORNELIUS PRESTON, ADMINISTRATOR, & CO.

New Jersey Court of Errors and Appeals, Nov. 18, 1896.

ELECTRIC STREET RAILWAY—CONTRIBUTORY NEGLIGENCE OF TRAVELER.

(Head-note by the court):

It is the duty of a carriage driver not to obstruct the track of a trolley car.

Whether his negligence was proximately contributory to the collision which followed is for the jury to determine.

FACTS stated in opinion.

J. Willard Morgan and *Samuel H. Grey*, for plaintiff in error.

Robert S. Clymer, for defendant in error.

DAYTON, J.: Suit was brought by Cornelius Preston, administrator of Charles C. Preston, to recover damages for the loss which the latter's widow and orphans sustained by his death. A verdict was rendered for the plaintiff below, and the case is brought into this court upon exceptions to the charge of the judge presiding at the trial. It appears by the evidence that the deceased was driving in an open pony wagon, after dark, from Camden to Wood-

bury, on the line of the electric railway. At a point on Broadway near the Newton Creek bridge, a car, coming in the same direction, collided with the wagon, threw out the deceased, and the front wheel of the wagon passing over him, caused his immediate death. The defense to this action was contributory negligence on the part of the deceased; that, with abundant warning of the car's approach, he wilfully and illegally drove, or continued, upon the track in such manner as to make the collision inevitable. The question of negligence is eminently one of fact, for the jury to determine; but the plaintiff in error complains that, in submitting the case to the jury, the law applicable to the facts was so erroneously stated as to mislead the jury and prejudice the company's rights.

It is alleged that the trial court erred in refusing to charge, first, "that if the jury believe, from the evidence, that the trolley motorman gave full and fair notice by ringing the bell, it was the duty of the carriage driver, the decedent, proceeding in the same direction, to drive on some other part of the road, and allow the trolley car to pass; and, if he did not, he was guilty of contributory negligence, and plaintiff cannot recover." Trolley companies, by permission of the Legislature, may, in common with all persons, lawfully use that part of the highway over which their tracks are laid. Every other citizen may use all parts of the way, including the railway tracks, excepting use of the rails for the purpose of conducting the business of transportation in competition with the trolley companies. *Citizens' Coach Co. v. Camden Horse R. Co.*, 33 N. J. Eq. 267. An unreasonable obstruction to the passage of the trolley car, in the conduct of its business, like the unreasonable obstruction to the passage of any other vehicle in pursuit of its legitimate occupation along the street, would constitute a nuisance, and subject the offender to suit and penalty at law. The electric car in

question had a right to continue on its course in the straight line to which it was confined by the railway tracks, provided that, in so doing, it did not interfere with the rights of others. It could not turn out for other vehicles, but in this case there was no impediment to prevent the decedent from turning out to let the car pass. In the exercise of their mutual rights, it was incumbent upon the driver of the carriage, upon notice of the approach of the electric car, to make way for the latter. It was his duty to do so. Wilful and unnecessary obstruction of the car's progress at its usual and lawful speed could have been punished by legal process. The Legislature, however, did not clothe the railway company with power by violence to enforce the law for its benefit, or to punish the violation of a public right. It could not take the law into its own hands, and by violent means force the obstructing vehicle from its way. In doing so it would clearly become a wrongdoer. *Paterson Ry. Co. v. Lanning*, 18 N. J. Law J. 245; *No. Hudson Co. Ry. Co. v. Isley*, 49 N. J. Law, 468. In refusing to charge that such neglect of duty was, in this case, of itself, contributory negligence on the part of decedent, as was requested in the language embraced in the third exception, there was no error, because it does not follow necessarily that such neglect of duty was so proximately contributory to the collision as to relieve the company from responsibility. Neglect of a legal duty on plaintiff's part is not a good defense to an action for damages, unless it was proximately contributory to the injury. The question left to the jury was whether the defendant, under the circumstances, exercised reasonable care to avoid the accident. If the motorman knew that decedent's wagon was on the track, so that a collision with it was necessary, or even probable, should the car advance, it was his wilful and wrongful act which caused the accident. If the agent of defendant, by the exercise of ordinary care, could have avoided the collision, notwith-

standing decedents' negligence, he was bound to do so; and the company is responsible for any damages that resulted from failure in that respect. *Raisin v. Mitchell*, 9 Car. & P. 613; *Bridge v. Railway Co.*, 3 Mees. & W. 244; *Davies v. Mann*, 10 Mees. & W. 546; *Steele v. Burkhardt*, 104 Mass. 59. In all cases where the defendant's negligence was so gross as to imply a disregard of consequences, or a willingness to inflict the injury, the plaintiff may recover, even though he was a trespasser, or did not use ordinary care. *Lafayette & Indianapolis Railroad Co. v. Adams*, 26 Ind. 76. If the cause proximately contributed to the result, there can be no recovery; but, if it was only a remote cause or condition of the injury, a recovery can be had. If the motorman, before the collision, knew that decedent was on the track, although there unlawfully and negligently, in pushing his car ahead without reasonable care to prevent collision, he would be guilty of an act of carelessness, independent of the previous negligence of the plaintiff. Whether, in the concurrent actions of the plaintiff and defendant's agent at the time of the accident, any negligence contributory to the result could be imputed to the decedent, was a question of fact properly left to the jury to determine.

The defendant further requested the court to charge "that if the jury believe, from the evidence, that plaintiff's decedent was driving at the time of the accident, and was intoxicated, and for this reason did not observe the ringing of the bell, or the noise of the trolley, or light of the same, he was guilty of contributory negligence, and plaintiff cannot recover." The response to this request was substantially a compliance with it. It was, in terms, sufficiently favorable to the defendant, and the exception cannot be sustained.

The fourth exception, being to the refusal of the court to charge that there was no proof that the motorman went on for the purpose of pushing the carriage off the track,

and so struck the carriage, must be overruled. The court properly said it considered there was sufficient evidence for that to be one of the propositions for the jury to consider. The motorman knew that decedent had been driving on the track before him, and had failed to turn off when the bell was rung. He expected to have trouble, as was stated by the conductor of the car. It was his duty to have avoided the accident by exercising all reasonable care in the circumstances apparent to him. That it was the duty of the deceased to clear the track did not justify the driver of the car in abating one jot of his vigilance and care. The refusal of the judge to charge the jury that it was the legal duty of the plaintiff's intestate to get off the track, and that failure to perform such duty was of itself such contributory negligence as precluded the plaintiff from recovering damages, was not such an inaccurate statement of the law as to prejudice the case of the defendant. Judgment should be affirmed.

NOTE.—See note to *Hall v. Ogden City St. Ry. Co.*, *post*.

PHILIP ZIMMERMAN, AS ADMINISTRATOR, &C., OF LAWRENCE ZIMMERMAN, DECEASED, Appellant, v. THE UNION RAILWAY COMPANY OF NEW YORK CITY, Respondent.

New York Supreme Court, Appellate Division, Second Department, April, 1896.

(3 App. Div. 219.)

ELECTRIC STREET RAILWAY—DUTY TO TRAVELER—CONTRIBUTORY NEGLIGENCE.

In an action for damages for injuries caused by collision with a trolley car, it appeared that the car was about one hundred and fifty yards from the crossing when the wagon in which the person injured was riding reached the track; that the driver was attempting to cross the track, with his horse at a walk, when the car struck the wagon.

Held, that a non-suit was improperly granted; that the railway company had no paramount right of way; and that the wagon being prior in time at the crossing was prior in right. That the questions of negligence and contributory negligence should have been submitted to the jury.

APPEAL by plaintiff from judgment of Supreme Court, Westchester county, upon the dismissal of the complaint in an action for damages for death of plaintiff's intestate.

Ralph Hickox, for appellant.

William N. Cohen and *F. H. Gerrodette*, for respondent.

CULLEN, J.: The evidence on the trial tended to show that the plaintiff's intestate was riding in a wagon with three other men, on the Southern boulevard, across Boston avenue, upon which latter street the defendant operated a trolley railroad. The wagon was driven by one Madden, and the deceased was riding in it as Madden's guest. When the wagon reached the railroad the trolley car was approaching the crossing, being then at a distance of some 150 yards from it. Madden slowed his horse to a walk and proceeded across the tracks. Before he had cleared the tracks the trolley car struck the hind wheel of the wagon and overturned it. The deceased was thrown out and killed.

We think that these facts presented a proper case to be submitted to the jury to pass upon. The wagon was being driven across the railroad, not within its tracks. The defendant's car had no paramount right of way at the crossing. *O'Neil v. Dry Dock, etc. R. R. Co.*, 129 N. Y. 125. The distance from the car to the crossing, at the time Madden sought to cross, was such as to enable the wagon to pass safely if the defendant's car had been properly managed, and this Madden and the deceased had a right to expect. The wagon was prior in time at the crossing and, therefore, prior in right. The driver was not bound to get out of the way of the car, nor can it be said to be

negligence on his part that he proceeded to cross at a walk. There are doubtless some improbabilities in the testimony given by plaintiff's witnesses. These were for the consideration of the jury; they were not such or so gross that the court could say, as a matter of law, that the truth of the narrative was impossible. On the facts testified to, the case falls within that of *Buhrens v. Dry Dock, etc. R. R. Co.*, 53 Hun, 571, and the question of contributory negligence was for the jury.

The judgment appealed from should be reversed and a new trial ordered, costs to abide the event.

All concurred.

Judgment reversed and new trial granted, costs to abide event.

NOTE.—See note to *Hall v. Ogden City St. Ry. Co.*, *post*.

JOSEPH ALBERT, AS ADMINISTRATOR, ETC., OF LORETTA ALBERT, DECEASED, Respondent, v. THE ALBANY RAILWAY, Appellant.

New York, Supreme Court, Appellate Division, Third Dept., May, 1896.

INJURY BY TROLLEY CAR—CONTRIBUTORY NEGLIGENCE OF PARENT.

Held, contributory negligence as matter of law for a mother to send upon an errand, in a city, two children aged three and five respectively, where they must cross and recross the tracks of an electric street railway, upon which cars were run as often as once in ten minutes, unattended, and at liberty to play about that dangerous locality as long as they chose.

APPEAL from judgment of Supreme Court, Albany county, entered upon verdict of a jury, and from an order denying defendant's motion for new trial upon the minutes.

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S. W. Rosendale, for the appellant.

J. Newton Fiero, for the respondent.

PARKER, P. J.: The infant daughter of the plaintiff, aged three years and four months, while attempting to cross South Pearl street, in the city of Albany, was run over by one of the defendant's trolley cars and killed. This action is brought under the statute to recover damages for the loss which her next-of-kin have sustained by reason of her death. Upon the trial the jury gave a verdict against the defendant for \$3,000, and from the judgment entered thereon and from an order denying the defendant's motion for a new trial this appeal is taken.

The child was run over while attempting to cross the tracks in front of an approaching car. The car was in plain sight and but a short distance away when she entered upon the tracks, and it is plain from the evidence that had she been of mature years her own negligence so far contributed to the injury that it would have barred a recovery in this action. But she was plainly "*non sui juris*," and her own negligence, therefore, will not have that effect.

But the first question that presents itself to us is, whether the child's parents were so free from contributory negligence that the action can be sustained. It is the settled rule in this State that it is not negligence, as matter of law, for parents to permit a child "*non sui juris*" to play in the public streets of a city. The question of negligence depends upon the circumstances of each case, and is usually one for the jury. In this case the jury have evidently found that the parents were free from negligence, but with that conclusion we are not able to agree. The father of the child, being away at his work, the children were left in their mother's care at home. The family residence was something over two blocks from

South Pearl street. On the afternoon of April 27, 1892, the mother sent this little child, in company with her sister, a child five years of age, to a shoe store in South Pearl street to get their shoes, which had been left there for repair. To reach that store they were obliged to cross the railroad track running through such street. This fact was known to the mother when she sent them, and she testified that she thought it was a dangerous place for children, and that she told the children, when they started, to be very careful of the cars. The children went to the shoe store, crossing the tracks in safety. They then safely crossed back to a candy store. They then attempted to recross to the east side, on which the shoe store was located. The eldest went ahead, but a short distance ahead of the approaching car. The little one, in attempting to follow her, was struck by the car and killed.

Under these circumstances, which are not disputed, we are of the opinion that the mother was guilty of such negligence as prevents a recovery for the death of her child. Both of the children were of such tender age that neither could be expected to exercise any judgment or care for herself, or appreciate any threatening danger. They were deliberately sent into the neighborhood of a railroad track, where cars run by electricity were passing as often as once in every ten minutes. They were sent on an errand that required them to cross such track; they were in charge of no one, and at liberty to play about that dangerous locality as long as they chose, and in the unrestrained and careless manner that would naturally be expected from children of that age.

In our judgment such conduct was gross carelessness on the part of the mother, and the cases to which our attention has been called by the plaintiff's counsel do not hold otherwise. In all of those cases it is held that the question of negligence must depend upon the circum-

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stances of each case, and in neither of them were the circumstances such as are now presented to us. We place this decision upon the ground that the mother sent this child without protection into a locality known to her to be an exceedingly dangerous one, and where the child would be very liable to meet with the very accident that did occur. No case to our knowledge has sustained, or allowed a jury to sustain, such conduct on the part of a parent, nor are we inclined to do it in this case.

The judgment and order are reversed and a new trial granted, costs to abide the event.

MERWIN, PUTNAM and EDWARDS, JJ., concurred; LANDON and HERRICK, JJ., not sitting.

Judgment and order reversed, and a new trial granted, costs to abide the event.

NOTE.—See note to *Hall v. Ogden City St. Ry. Co.*, *post*.

JOHN DOYLE, Respondent, v. THE ALBANY RAILWAY,
Appellant.

N. Y. Supreme Court, Appellate Division, Third Department, May, 1896.

ELECTRIC STREET RAILWAY—VIOLATION OF ITS OWN RULES.—CONTRIBUTORY NEGLIGENCE.

It is contributory negligence as matter of law for a person to cross the track of an electric railway, either without first looking for an approaching car, or to cross with knowledge that a car is approaching and miscalculating the chances.

Failure of those in charge of the car to obey a rule or custom of the company requiring that all cars be stopped before passing a car when stopped at a crossing or station, will not absolve the traveler from the duty of vigilance.

APPEAL from judgment of Supreme Court, Albany county, entered upon the verdict of a jury, and from an

order denying defendant's motion for a new trial upon the minutes.

Simon W. Rosendale, for the appellant.

John H. Gleason, for the respondent.

EDWARDS, J.: From the plaintiff's testimony it is evident that his injury was, at least in part, the result of his negligence. He was a passenger on one of the defendant's electric cars running from Albany to Troy. The defendant's road has two tracks, the cars for Troy running on the easterly and those for Albany on the westerly track. At Ward's lane, about half a mile from the city of Albany, the car stopped to permit the plaintiff and his companion, Hughes, to alight. The plaintiff alighted from the easterly side of the car, preceded by Hughes, and as soon as he reached the ground the car in which he had been riding started and rapidly proceeded on its way northerly. To reach his residence it was necessary to cross both tracks, with the location of which, and with the running of the cars, he was familiar. After he had crossed the easterly track he came to a space of five feet between that and the westerly track. One of the defendant's cars coming down from Troy on the westerly track was then approaching. It was about ten o'clock at night and dark. This down car was lighted with electric light, had a large headlight, and Hughes says "was one glare of light." While the evidence furnishes very strong grounds for the belief that this car could have been seen before the plaintiff had crossed the easterly track, it is beyond question that from his position between the two tracks it was plainly visible. It is inconceivable that the trolley post, eight inches in diameter, midway between the two tracks, five feet apart, could have obstructed his vision. Instead of remaining between the tracks, or stepping back upon

the easterly track until the approaching car had passed, the plaintiff proceeded to cross the westerly track, and, when nearly over, was struck by the car, his companion, who was just ahead, having reached the other side in safety. The law is too well settled to require the citation of any authorities that it is the duty of a person before crossing a traveled railway to look for an approaching train, and a failure to do so, when the view is unobstructed, or crossing with knowledge of an approaching train, precludes a recovery for any injuries sustained. The plaintiff does not swear that he looked for the down car, and the conclusion is irresistible that he either did not look, or that he saw it and miscalculated his chances of crossing in safety. The latter is very probable. Either is fatal to his recovery. There was a rule and custom of the defendant that when a car is standing at a street crossing or station an approaching car must not pass, but come to a full stop, but the plaintiff could not so rely upon this custom as to absolve him from the duty of vigilance. Assuming that there was on this occasion a violation of the rule, which may be gravely doubted, the plaintiff, by the exercise of that care which the law imposed upon him, would have discovered it in time to avert any injurious consequences to himself.

In *Dobert v. Troy City Railway Company*, recently decided by the General Term in this department, the learned judge who wrote the prevailing opinion says: "The evidence discloses that the intestate on passing around the rear end of the car on which he had been riding, looked in the direction of the approaching car, . . . and which car, as would appear from the evidence, was hidden from the view of the intestate until the very moment of his fatal collision with it." He also says it was "upon a crowded thoroughfare," and it did "not appear that he was familiar with this crossing." In respect to those facts there is

between that case and this an obvious and essential distinction.

The judgment should be reversed and a new trial granted, with costs to abide the event.

All concurred, except LANDON and HERRICK, JJ., not sitting.

Judgment and order reversed and a new trial granted, costs to abide the event.

NOTE.—See note to *Hall v. Ogden City St. Ry. Co.*, *post*.

WESLEY J. PENNY, BY BENJAMIN F. PENNY, HIS GUARDIAN AD LITEM, Respondent, v. ROCHESTER RAILWAY COMPANY, Appellant.

N. Y. Supreme Court, Appellate Division, Fourth Department, June, 1896.

(7 App. Div. 595.)

ELECTRIC STREET RAILWAY—DUTY TO TRAVELER—FAILURE TO PROVIDE SAND IN SAND-BOX.

In an action for damages to a child by a trolley car at a street crossing there was evidence that the car was provided with a sand-box, and if it had been supplied with sand and in use the car could have been stopped in time to avoid the accident.

Held, that it being part of the duty of the company to have its cars under control when approaching a crossing, the jury was properly allowed to pass upon the question whether or not the company was negligent in omitting to provide sand.

APPEAL from judgment of Supreme Court, Monroe county, entered upon a verdict, and from an order denying motion for new trial upon the minutes.

The plaintiff, a child seven years old, was struck by the guard of a trolley car, carried some distance and then thrown under the car and injured. The car was running

at a speed forbidden by city ordinance. It was provided with a sand box, but with no sand. There was evidence to warrant the inference that by sanding the track the accident might have been avoided.

It was conceded that there was sufficient evidence of defendant's negligence to warrant the submission of that question to the jury.

The court decided, in the omitted portion of the opinion, that the question of contributory negligence of the child and its parents was properly left to the jury.

Henry M. Hill, for the respondent.

Charles J. Bissell, for the appellant.

GREEN, J.:

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Upon the trial exceptions were taken by defendant to the charge of the court and to its refusal to charge as requested.

Of these, two only need be considered, as the others are directed to the subjects already discussed and decided, and the conclusion already reached upon that branch of the case governs the disposition that should be made of those two exceptions.

Plaintiff's counsel asked the court to charge the jury: "That if the jury shall find that by the use of sand at the time this accident happened the car might have been stopped in a shorter space than it was, it is a question for them to say whether it was not negligence on the part of the defendant that there was no sand there to use."

By the Court: "I think I have instructed the jury that that is one of the questions in this case that they are to consider in determining this evidence."

Defendant's counsel excepted to the instruction and

requested the court to charge: "That under the evidence in the case the omission on the part of the defendant to provide sand in the box upon the car, at the season of the year when this accident occurred, is not any evidence of negligence upon defendant's part."

By the Court: "I decline to charge that, and state, as I have already stated, that it is a question for the jury." Defendant's counsel excepted.

The plaintiff gave evidence tending to show that the rails were dry and dusty at the time of the accident, and claimed that under those conditions the car could have been stopped in much less space and time than it was, as it appeared from the evidence that, with a dry rail, the car could be stopped almost instantly. The defendant, to meet this, gave evidence tending to show that the street had been sprinkled shortly before the accident, and that the rails were "greasy" with thin mud. One of the defendant's motormen testified: "On a greasy rail, with the reverse, it locks the wheels and they slide along until they strike something gritty, On a greasy rail I have known the wheels to be revolving the other way and the car still sliding in the opposite direction. . . . With a greasy rail I cannot give you any particular distance in which a car can be stopped."

Another motorman said: "When your track is greasy, a man might stop a car, may be within one hundred feet, running seven miles an hour; he might be able to stop it in a hundred feet, but could not say that; you couldn't make any estimate on it any nearer than that."

Another said: "Assuming the rail was slippery, or a greasy rail, I could not give you any particular distance in which I could bring it to a stop, because the car is sliding, and no knowing when she will stop when she gets to sliding."

Another testified: "Assuming that I had got a greasy rail, I cannot give you any distance in which I could

bring it to a stop, either by the use of the brake or the reverse."

The motorman in charge of the car testified that, by the use of sand, the car could have been stopped more quickly than it was. If this had been done, the injury to the child could probably have been prevented, as only the front wheel of the car barely passed over his leg; a few inches of space would have saved him.

The defendant had equipped all its cars with sand boxes. The sand is carried in a box under the seat of the car, and is sprinkled upon the rail by the motorman pressing with his foot upon a valve. The car in question was provided with a sand box and valve. The defendant claimed that the sand was apt to cake in warm weather, and that it was actually used on its car only in the fall, winter and spring; but it was shown to be as useful, necessary and effectual to stop or start a car on a greasy rail in one season of the year as another.

The claim of the defendant was that the injury was unavoidable. That by reason of the greasy condition of the rail the motorman could not stop his car in time to prevent the accident. The motorman said he could have stopped it if there had been sand. The necessity for the use of sand on greasy or slippery rails had become apparent to the defendant. Its effect and operation upon rails in that condition were known. It had adopted its use and provided attachments and appliances on its cars for that purpose.

It was the duty of defendant to have its car under control as it approached and crossed Orange street; and, if not actually slowed down, the motorman should have had the means at his command to stop the car immediately upon the appearance of danger. *O'Neil v. D. D., E. B. & B. R. R. Co.*, 129 N. Y. 125; *Buhrens v. Dry Dock, etc. R. R. Co.*, 53 Hun, 571.

This was not a question of the introduction of a new

appliance, but as to the obligation of defendant in the management of its cars to use an appliance already approved and used, and of the degree of care to be exercised in operating its road over the street crossings of a city.

The degree of care in the management of its cars, exacted of a street railway company using electricity as a motive power, and traversing the streets of a populous city, where danger to pedestrians is to be constantly guarded against, is not less than that required of the company to its passengers. Booth on St. Rys., 33, 305-328.

We conclude that the court committed no error in its charge, nor in its refusal to charge upon this subject.

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We are of the opinion that the judgment and order should be affirmed, with costs.

All concurred.

Judgment and order affirmed, with costs.

NOTE.—See note to *Hall v. Ogden City St. Ry. Co.*, *post*.

LEOPOLD MEYER, Respondent, v. THE BROOKLYN HEIGHTS
RAILROAD COMPANY, Appellant.

N. Y. Supreme Court, General Term, Second Department, Oct., 1896.

(9 App. Div. 79.)

ELECTRIC STREET RAILWAY—CONTRIBUTORY NEGLIGENCE.

To start, with a horse at a walk, to drive diagonally across the track of an electric street railway, though seeing an approaching car one hundred feet away, is contributory negligence as matter of law.

APPEAL from judgment of Supreme Court in favor of plaintiff, and from order denying motion for new trial upon the minutes.

William W. Goodrich, for the appellant.

James D. Bell, for the respondent.

WILLARD BARTLETT, J.: The plaintiff in this action did not sustain the burden which the law placed upon him of proving his own freedom from contributory negligence.

The accident which gave rise to the suit occurred on Fulton avenue near Throop avenue in the city of Brooklyn, on the 29th day of September, 1894, at about nine o'clock in the evening. The plaintiff had been driving in a buggy along the south side of Fulton avenue in an easterly direction. When he reached a point about seventy-five or eighty feet from Throop avenue, he turned his horse to the left so as to cross the tracks of the defendant's railroad diagonally and get into that street, which runs out of Fulton avenue on the north, but does not cross it. His horse was walking. At the same time a car of

the defendant's was coming down Fulton avenue on the north track, having reached a point about seventy-five feet the other side of Throop avenue. The plaintiff himself did not testify definitely as to these distances, but the figures were given by the principal other eye witness of the accident. They show that, when the plaintiff started his horse at this slow rate in a diagonal direction across the track upon which was the approaching car, his buggy and the car must have been about 150 feet apart. The car was brightly illuminated by a headlight in front and electric lights within, and was in plain view of the plaintiff, who saw it distinctly, there being no other vehicles on the block. He testified that he thought he had lots of time to cross. In fact, however, the car collided with his buggy when he had gone only "the distance of two houses in this diagonal direction." We think these circumstances point clearly to his own imprudence as one of the causes contributing to the collision. He does not appear to have given any sign to the motorman on the defendant's car to indicate that he meant to turn into Throop avenue, and that intention could hardly have been made manifest in the short time during which he pursued his diagonal course before the accident occurred. To start in such a direction, with his horse at a walk, and the approaching car only 150 feet distant, was to invite disaster, unless he took some efficient means to let the motorman know where he proposed to go. The case is not like that of a vehicle driven along a cross street at right angles over a railroad track in the intersecting street. There the passage of trucks, wagons and carriages of various kinds is to be expected, and persons operating the railroad cars must be watchful to avoid them. But Throop avenue does not cross Fulton avenue, and the defendant's motorman was not bound to anticipate that the driver of a buggy, in order to get into that street, would drive diagonally on to the track toward his approaching car, at a dangerously short distance

from it and without any notice. The plaintiff's act may be compared to that of a mariner whose vessel is run down because he has not given himself room enough when he undertakes to sail across the bows of another craft. Such experiments are perilous and apt to result in misfortune.

The judgment and order appealed from must be reversed and a new trial granted, with costs to abide the event.

All concurred.

Judgment and order reversed and new trial granted, costs to abide the event.

NOTE.— See note to *Hall v. Ogden City St. Ry. Co.*, *post*.

BARBARA BROZEK, AS ADMINISTRATRIX, &C. OF ALOIS BROZEK, DECEASED, Appellant, v. THE STEINWAY RAILWAY COMPANY, Respondent.

N. Y. Supreme Court, Appellate Division, Second Department, Nov., 1896.

(10 App. Div. 360.)

ELECTRIC STREET RAILWAY—INJURY TO TRAVELER.

Plaintiff's intestate received injuries which resulted in his death, under the following circumstances: He was driving along the same street in which the defendant's railway was located, to the north of the track. At a street crossing he turned to cross the tracks, to go southerly. His wagon was struck by a trolley car approaching from the same direction that he had come. He could have seen the car if he had looked in that direction. The evidence warranted the finding that the car was moving eight or ten miles an hour, and that when the horse stepped upon the track the car was forty or fifty feet away. The accident happened in the daytime, on a clear summer day. There was nothing to obstruct the view of either motorman or traveler.

Held, that what may be negligence in crossing a steam railway may not be so in crossing a trolley railway. That the trolley car is more subject to control than a steam car; and therefore neither trolley car nor

ordinary vehicle has superior or paramount right of way at street crossings. That it should have been left to the jury to determine whether, even if the deceased had seen the car so far away, it was contributory negligence to attempt to cross. Also whether the motorman was not negligent in failing to stop or slow the car, in view of all the circumstances.

APPEAL from judgment entered upon dismissal of complaint by the court after trial at trial term of Supreme Court, Kings county.

F. W. Catlin, for the appellant.

Albert E. Lamb, for the respondent.

BRADLEY, J.: The plaintiff's intestate, in his wagon, proceeding to turn from Jackson avenue into Honeywell street in Long Island City, was, by the collision with it of the defendant's car on the avenue, thrown from the wagon and received an injury resulting in his death. The inquiry here is whether the evidence was such as to present questions of fact for the jury, or those of law only. The latter view was taken by the trial court and the complaint was dismissed.

The burden was with the plaintiff to prove that the accident was attributable to the negligence of the defendant and occurred without negligence on the part of the plaintiff's intestate. He was in his covered bakery wagon, drawn by one horse, which he was driving. He occupied the right hand side of the seat. Left of him on the same seat was his son. There were sliding doors on either side and a window in front. They were open. There was no opening in the rear end of it. The deceased had driven along Jackson avenue for some distance westerly, on the north side of the defendant's railway tracks, until he reached Honeywell street, into which he proceeded to turn southerly to go to his home. In doing so he had to cross the two tracks of the railroad. His horse had got across

the first track and his wagon had nearly got over when its near side hind wheel was struck by the car with the result before mentioned. The car was approaching in the same direction in which he had proceeded to the street crossing. It does not appear by the evidence that he saw the car. The son did not see it nor did he look out in the direction from which it came when the wagon turned to cross over the track. And his evidence is to the effect that his father was looking out to the right, while the car could be seen only by looking to the left. The only occasion for looking to the right was to see whether any car was approaching from the west on the second track. The evidence tended to prove that the decedent could have looked easterly through the open door on that side of the wagon after it turned to go into Honeywell street, but it does not appear that he did so. It is very likely that for this reason the trial court entertained the view that there was a failure of proof that he was free from contributory negligence. This view would be supported if he had under like circumstances been crossing steam railway tracks. While freedom from contributory negligence is no less requisite in passing over a trolley road like the one in question than in proceeding to cross the tracks of a steam railroad, what may be negligence in the latter may not in the former. The distinction is in the fact that the trolley car is more subject to the control of the person operating it than is the train drawn by a steam engine. The one can, if the machinery is in order, be stopped in a short distance, and is, therefore, more suitable for use in the streets of cities. And for that reason it is held that, as between trolley cars and other vehicles on the streets, there is no superior or paramount right of either at street crossings on which is the line of the railway. There care to avoid collision must be exercised by both the car and other driver. *Buhrens v. Dry Dock, etc. R. R. Co.*, 53 Hun, 571; 125 N. Y. 702; *Zimmerman v. Union*

R. Co., 3 App. Div. 219; *Smith v. Met. Street Railway Co.*, 7 id. 253; *O'Neil v. D. D., E. B. & B. R. R. Co.*, 129 N. Y. 125.

While the cars are necessarily confined to the tracks, other vehicles are not thus restricted in their movements, and the latter cannot, without culpable negligence, be voluntarily driven upon a railroad track in such proximity to an approaching car as to give apprehension of danger of collision. This restriction in the line of movement of cars is, therefore, entitled to such consideration as necessity fairly requires of others in crossing the streets where such a railway is located and operated.

In the present case the conclusion was warranted by the evidence that the defendant's car was moving at the rate of eight to twelve miles per hour up to the time of the collision, and that, when the plaintiff's intestate proceeded to cross the track and his horse stepped upon it, the car was from forty to fifty feet from that place. If that were so, could it be said, as matter of law, that the intestate would have been chargeable with negligence in driving upon the track if he had seen the car that distance away? Unless it would have been imputable to him in such case, it is difficult to see that he should have been charged with negligence in proceeding as he did to cross the track. A trolley car is supposed to be under the reasonable control of the motorman, and persons with vehicles passing over the railroad tracks at street crossings may assume that care will be used to reduce the speed of cars, when at a sufficient distance from a passing team to permit it, so as to enable the vehicle to get out of the way. Otherwise it evidently would at times not only be inconvenient, but quite dangerous, to drive at crossings on streets of a city in which such railways are operated.

The view taken of this case is that the evidence was such as to present to the jury the question of fact whether or

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not the defendant was chargeable with negligence in not decreasing the speed of the car when the motorman should have seen that the intestate was crossing the track, and, in view of the distance of the car from him when he proceeded to cross and of all the circumstances, whether negligence was imputable to him in doing so. The time when this accident occurred was on a clear day in June about two and half o'clock in the afternoon. The way was clear for the motorman to see the movement of the wagon and for the deceased to see the car, and, if the car was far enough away when the deceased proceeded to cross the track to reasonably enable the motorman to abate the speed of the car so as to avoid the collision, the jury would have been warranted in the conclusion not only that negligence was attributable to the defendant, but for the same reason, unless other circumstances intervened, that the plaintiff's intestate was free from contributory negligence. *Timony v. Brooklyn City & N. R. Co.*, 63 N. Y. St. Repr. 311; 145 N. Y. 648.

We have examined the many cases cited by the learned counsel for the defendant, and none of them, in the view taken of the facts upon which they were determined, support his contention that there was no evidence in the present case to support a verdict for the plaintiff. The questions essential to the maintenance of the action were those of fact and should have been submitted to the jury.

It follows that the judgment should be reversed and a new trial granted, costs to abide the event.

All concurred.

Judgment reversed and new trial granted, costs to abide the event.

NOTE.—See note to *Hall v. Ogden City St. Ry. Co.*, *post*.

JACOB FISHBACH, Respondent, v. THE STEINWAY RAILWAY
COMPANY OF LONG ISLAND CITY, Appellant.

New York Supreme Court, Appellate Division, Second Dept., Dec., 1896.

(11 App. Div. 152.)

ELECTRIC STREET RAILWAY—INJURY TO TRAVELER.

In an action for damages for injury sustained by collision with a trolley car, the following facts appeared: Plaintiff was driving eastward upon the west bound track, when, to avoid an approaching car, he turned off and drove upon the other track. Before doing so, according to the testimony of plaintiff and his son, they both looked back (being able to see two or three blocks) for approaching cars, but saw none. They had driven eastward about three blocks, taking from four to eight minutes, without looking back again, when their wagon was struck by a car which had given no warning. Defendant's testimony was that the morning was so dark that objects, including the plaintiff's wagon, could be seen not more than eighteen feet away; that the car was running five or six miles an hour; that the motorman was ringing the bell; that he reversed the power as soon as he saw the wagon, but was unable to avoid collision. It also appeared that plaintiff was a baker, had been up all night, was sleepy, and had before that time been found asleep in his wagon on the track.

Held, that the questions of negligence and contributory negligence were properly submitted to the jury.

That the rule laid down in *Winter v. Crosstown St. Ry. Co.*, 5 Am. Electl. Cas. 515 (opinion by the same justice as in this case), that as matter of law "a failure by the driver of a wagon, on a street car track, to remove his wagon therefrom in time to avoid collision with a car approaching from his rear when, by looking to the rear he might have discovered the car in time to leave the track and avoid the collision, constituted contributory negligence even though the motorman might by the exercise of proper care have avoided the collision," is unsound.

That no more stringent rule exists than that "the person driving in a car track must exercise reasonable care, and that this is to be determined from a consideration of the obligations resting upon the operator of the car, the burden of use which general traffic imposes upon the street, and the rule that the car has the paramount, but not the exclusive, right of way."

That the operator of a street car is bound to have the car under control, and to so operate the same as to give vehicles a reasonable opportunity

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to get off the track, and to exercise reasonable diligence in making discovery of obstructions in its front.

Cases of this series cited in opinion, appearing in bold faced type: *Winter v. Crosstown St. Ry. Co.*, vol. 5, p. 515; *Bernhard v. Rochester Ry. Co.*, vol. 4, p. 506; *Meisch v. Rochester Elec. Ry. Co.*, vol. 4, p. 520.

APPEAL from judgment entered upon the verdict of a jury at a trial term of the Supreme Court, Queens county, also from order denying motion for new trial upon the minutes.

Eugene L. Bushe, for the appellant.

Ferdinand E. M. Bullowa, for the respondent.

HATCH, J.: The testimony upon the part of the plaintiff tended to establish that, at about five-thirty o'clock on the morning of December 11, 1895, he drove a covered baker's wagon upon defendant's tracks. He was accompanied by his son, who sat upon the seat in the wagon by his side. The wagon was first driven in the west bound track, but seeing a car approaching upon that track in his front he turned off and drove upon the east bound track to allow the car to pass. Plaintiff and his son both testify that when they came upon the east bound track they could see for a distance of two or three blocks; that each looked to the rear for the purpose of seeing whether a car was approaching from that direction, and, seeing none, continued to drive west upon the track for a distance of about three blocks, occupying a period of from four to eight minutes. Neither the father nor son looked to the rear after making their first observation. Defendant's tracks at this point had been recently constructed, and plaintiff's evidence tended to establish that the road by the side of the track was out of repair, and that driving therein would be attended with difficulty, if it could be done at all. There is some proof in this connection that the condition, to some extent, was due to the construction of defendant's

road. It is, however, a matter of inference arising from the evidence, rather than a fact established by direct proof. Plaintiff claimed, and his evidence tends to support the claim, that while in this position the defendant, without any warning, ran its trolley car into the rear end of his wagon with force sufficient to shatter the same, injuring the plaintiff's horse so that he was thereafter required to kill it, and inflicting severe injuries to his person.

The testimony upon the part of the defendant tended to establish that the morning was very dark; that objects could not be seen for a greater distance than eighteen feet; that the car was running at the rate of five or six miles an hour, and the motorman was sounding the bell; that he did not discover plaintiff's wagon upon the track until his car was within fifteen to eighteen feet of it; that he then reversed the motive power of the car, but was unable to prevent a slight contact with the wagon, inflicting little, if any, damage thereto. Further proof tended to establish that plaintiff was a baker, had been up all night, was in a sleepy condition, and had, prior to that time, been found asleep in his wagon upon the tracks. We are of opinion that upon this proof the court was correct in holding that the question of defendant's negligence, and of plaintiff's contributory negligence, became questions of fact for determination by the jury.

We should not have deemed it necessary to give expression to our views in a written opinion in this case, were it not for the fact that in one opinion at least, now relied upon to reverse this judgment, expression of what facts constituted contributory negligence as matter of law in a somewhat similar case does not meet with approval in our present view. In *Winter v. Crosstown Street R. Co.*, 8 Misc. Rep. 362, the court held as matter of law that a failure by the driver of a wagon, on a street car track, to remove his wagon therefrom in time to avoid collision with a car approaching from his rear when, by looking to

his rear, he might have discovered the car in time to leave the track, and avoid the collision, constituted contributory negligence even though the motorman might by the exercise of proper care have avoided the collision. This case is easily distinguishable from the present in the fact that the accident happened in broad daylight; the driver had made no attempt to observe the approach of the car, and had been in the track for nearly half an hour, and concededly the bell, announcing the approach, was sounded within the driver's hearing. In the present case, if plaintiff is to be believed, he made observation for the approaching car, was on the track but a short distance, and had driven thereon for a short distance, and no car was visible when he looked for a distance of two or three blocks, and he testified that he heard no bell ring upon the approaching car. I do not wish, however, to dispose of the present question upon this distinction. The opinion in the Winter case was written by the present writer. Subsequent reflection, however, has led my mind to the conclusion that its doctrine in this respect is unsound, and that its view is not in harmony with the current of contemporary authority and later decisions. This decision was based upon *Adolph v. Cen. Park, etc. R. R. Co.*, 76 N. Y. 538. There are some expressions in the opinion of Judge FOLGER which are susceptible of a construction which would support the rule laid down in the Winter case. But subsequent interpretation of that decision by the courts has left the case to stand upon no more stringent rule than that the person driving in a car track must exercise reasonable care, and that this is to be determined from a consideration of the obligations resting upon the operator of the car, the burden of use which general traffic imposes upon the street, and the rule that the car has the paramount, but not the exclusive, right of way. *McClain v. Brooklyn City R. R. Co.*, 116 N. Y. 459; *Bernhard v. Rochester Ry. Co.*, 68 Hun, 371.

In many streets the burden of use by the street cars themselves would amount to an exclusive use of the street if all other traffic were to halt when a car was in motion. So the care required is relative, having regard to the burden of use and the right of vehicles as well as street cars to occupy the street for passage. The increasing burden which traffic has imposed upon many streets, and the necessity which arises out of that condition, has modified somewhat the rule of the earlier cases. The operator of a street car is bound to have the car under control, and to so operate the same as to give vehicles a reasonable opportunity to get off the track, and to exercise reasonable diligence in making discovery of obstructions in his front. *Fleckenstein v. Dry Dock, etc. R. R. Co.*, 105 N. Y. 655; *Ward v. N. Y. & H. R. R. Co.*, 79 Hun, 390; *Metsch v. Rochester E. Ry. Co.*, 72 id. 604; *Smith v. Met. St. Ry. Co.*, 7 App. Div. 253; *Kessler v. Brooklyn Heights R. R. Co.*, 3 id. 426; *Rooks v. Houston, W. S. & P. F. R. Co.*, 10 id. 98.

We have before had occasion to assert that in this class of cases each must be determined upon its particular facts. *Irvine v. Palmer Mfg. Co.*, 3 App. Div. 388.

In this case we think that the questions of negligence and contributory negligence were for the jury and that the case was properly submitted.

It was not error to allow plaintiff to testify to the value of the horse. The testimony, while slight, showed that he had some knowledge upon the subject, and it was for the jury to determine how much weight should be given to his opinion. The statement of what he paid was some evidence of value, although not responsive to the question. If the defendant did not desire it to remain it should have moved to strike it out, as the objections did not reach the matter.

No substantial error appearing, the judgment should be affirmed, with costs.

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All concurred.

Judgment and order unanimously affirmed, with costs.

NOTE.—See note to *Hall v. Ogden City St. Ry. Co.*, *post*.

ROSA ULGER STABENAU, AN INFANT, BY ALBERT V. B. VOORHEES, JR., HER GUARDIAN AD LITEM, Respondent,
v. THE ATLANTIC AVENUE RAILROAD COMPANY OF BROOKLYN, Appellant.

N. Y. Supreme Court, Appellate Division, First Department, March, 1897.

(15 App. Div. 408.)

ELECTRIC STREET RAILWAY — INJURY TO TRAVELER.

When, to avoid impending collision, a motorman is obliged to choose instantly one of two appliances provided for stopping his car, he is not guilty of and the company is not chargeable with negligence because the event proves that the one he chose and used may not have been the best to meet the exigency; especially when the one selected is the more reliable, though possibly not as prompt in action.

The mere fact that children are seen by the motorman, running across the track from 50 to 100 feet in advance of his car, does not make it his duty to stop at once. Such duty only arises when there is ground for apprehending that they cannot cross in safety.

APPEAL from judgment of Supreme Court upon the verdict of a jury, and from an order denying motion for new trial upon the minutes.

Eugene Lamb Richards, Jr., and *Arthur L. Sherer*, for the appellant.

Henry B. Johnson, for the respondent.

INGRAHAM, J.: The plaintiff was injured by one of the defendant's cars, and the action is brought to recover

damages sustained in consequence of such injury. The case was submitted to the jury, who found a verdict for the plaintiff, and we are asked to reverse this judgment on the ground that the evidence did not justify a finding that the accident happened because of the negligence of the defendant. The accident happened at a street crossing at New Utrecht. The defendant's road approaches this crossing by a curve. There is a high board fence on the side of the defendant's road as it rounds this curve, so that the crossing where the plaintiff was injured is invisible from an approaching car until it is quite close to the side of the street. As one of the defendant's cars was approaching this crossing at about seven o'clock in the evening of January 19, 1894, several children attempted to cross the track in front of the car. It was a clear night, but with no moon, and was quite dark. All of the children crossed the track in safety, except the plaintiff, whose foot became caught between the rail and one of the planks out of which the crossing was constructed, so that she was unable to move. There is no evidence from which it can be determined as to what distance the car was away from the plaintiff at the time her foot was caught. The car was well under the motorman's control, and before the children were in sight the power had been turned off. The motorman was at his post attending to his duties, and the plaintiff's witnesses say that as soon as he became aware of the presence of the plaintiff upon the track, he put on the brake as hard as he could, attempting to stop the car, which he succeeded in doing when it had gone but a few inches past the child. The plaintiff's foot was not upon the rail, the injury being inflicted by some portion of the car, as it passed, striking the plaintiff's foot.

It seems to us that this evidence fails to disclose any negligence on the part of the defendant in the performance of any duty which it owed to the plaintiff. When the crossing came in sight, assuming that the car was in the

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neighborhood of 100 feet from the crossing, the mere fact that the children were running across the track did not require that the motorman should at once stop the car, as there was ample time for the children to safely cross in the absence of any unusual accident. This is apparent from the fact that all of the children except the plaintiff crossed in safety. Until the fact that the child's foot was caught in the track became known to the motorman, or until the fact was so apparent that, in the exercise of ordinary care, he should have known it, or until the car was so close to the child that there was ground for apprehending that the child could not cross the track in safety, it does not seem that it was the duty of the motorman to stop the car. *Fenton v. Second Ave. Railroad Company*, 126 N. Y. 625; *Lavin v. Second Ave. R. R. Co.*, 12 App. Div. 381. As before stated, we can find no evidence to justify a finding that there was any such indication as would impart to the motorman a knowledge of the plaintiff's inability to get out of the way of the car prior to the time the motorman commenced to put on the brake.

Chisholm, who was upon the platform of the car, being then an employe of the defendant, and who was called by the plaintiff, testified that they first saw the plaintiff as the car was coming around the corner. "The car ran after we first saw the children and before we saw this little girl fall, I should judge, about fifteen feet; something like that." He further testified that when the car was going up towards New Utrecht avenue, "and within about fifty or sixty feet, to the best of my opinion, we seen a lot of children on the crossing. When they seen the car coming they made a run. Maddock started to put on his brakes as hard as he could, and this little child, as she was running across she fell." There is not the slightest evidence tending to contradict this statement sworn to by the witnesses produced

by the plaintiff, that as soon as the child was seen crossing the track and before she fell, or as soon as it appeared that she was in danger, Maddock, the motorman, put on the brake and did what he could to stop the car. It is thus affirmatively shown that as soon as it appeared that the plaintiff was in any danger, Maddock attempted to stop the car. Is there any evidence here of negligence on the part of Maddock or of any one upon the car in failing to do what could be done under the circumstances to avoid the accident? I think not.

It seems that these cars are also furnished with what is called a reverse handle, which it appeared would stop the car quicker than the brake, if using it in that way did not blow out the fuse. Chisholm testified: "In speaking of this reverse handle or reversal handle, a car can be stopped quicker that way; but suppose that you used the controller and the reverse handle suddenly, it is possible that that sometimes blows out the fuse. In other words, you can't tell, when you use that reverse handle suddenly, whether it is going to blow out the fuse or not; therefore, I could not in this case tell positively, in case I had succeeded in reversing the controller handle, whether that would have blown out the fuse. She is liable to blow out any time if you turn it on suddenly; it is more apt to blow out when you suddenly reverse. I have known that to happen with a sudden reversal. That removes the power in use."

When the fact that the plaintiff was in danger was apparent, the motorman had to determine instantly—considering the distance he was from the child, and the nature of the two appliances at hand to stop the car—whether it was better to use the brake or the reverse handle. He determined to use the brake and did use it with such success that it stopped the car just as it reached the child. It was the duty of the motorman to determine which, under the circumstances, was the best method of stopping

the car, and the defendant is not guilty of negligence because of an error of judgment exercised under such circumstances. One of two things had to be done, and even now we cannot say with certainty that if this reverse handle had been used the car would have stopped any sooner than it did. What the motorman was bound to do at this critical moment was to exercise his best judgment in stopping the car immediately upon the appearance of such a condition as would indicate that the child was in danger. If he, under the circumstances, in good faith, considered that it was safer to attempt to use the brake at that time than to adopt any other means, and did use the brake to stop the car, the use of the brake, rather than the other appliance provided for the stopping of the car, was not, under the circumstances here disclosed, evidence of negligence, but the question as to which appliance should be used depended upon the judgment of the motorman under the circumstances as they appeared at the time. It is evident that if the brake had been sufficient to stop the car a few feet short of the place at which it was stopped, the brake would have been the more certain method of stopping the car than the reverse handle, but regard being had to the space within which the car was stopped, it may be said to be somewhat more probable that the use of the reverse handle would have avoided the accident, but we are not justified in requiring of a person placed in a position of this kind, where his judgment had to be exercised in a moment of danger, and where any hesitation in the exercise of such judgment would produce serious consequences, a knowledge of subsequent events and a judgment based thereon. It is by no means clear that in the situation in which the motorman found himself it was not more probable that the car would have been stopped and the accident avoided by the use of the brake rather than by the use of the other appliance. There is no substantial dispute that when it first became apparent

to a person on the car that this child was upon the track in danger, the motorman at once endeavored to stop the car. There is no evidence to show that he was neglecting his duty; that he was not watchful; that he did not see the plaintiff as soon as she could be seen by one in his position, or that there was anything up to the time that he commenced to put on this brake that would justify an apprehension of danger to the plaintiff.

This case is not unlike the case of *Fenton v. Second Avenue Railroad Company*, *supra*. Under the rule applied there, it is clear that no negligence could be attributed to this motorman: "If it be assumed that the boy fell twenty feet in front of the horses, as testified to by one of plaintiffs' witnesses, then the horses going at the usual rate of speed, assuming it to be six miles an hour, would have reached him in about two seconds, and that was all the time the drivers had to see the peril, apply the brake and arrest the motion of the car before reaching him, and there is no evidence that, by the exercise of all the vigilance that the law requires of drivers under such circumstances, they could, after the boy had fallen upon the track, have arrested the car in time to save him from injury. If it be assumed that they saw him as he approached the track, they had the same reason to suppose that he would get across that he had, and he probably would have crossed in front of the horses in safety if he had not fallen. No negligence can be attributed to the drivers because they did not apply the brake before they boy fell, because then, for the first time, the peril commenced and became apparent." This is applicable to the case at bar. These children, running across the track in front of the car, with plenty of time to cross in safety, were in no apparent peril. That peril became apparent for the first time when it appeared that the child's foot had caught in the rail. There could be no negligence in the motorman's not applying the brake or stopping the car until it became

apparent that the child could not cross the track in safety. The finding of the jury that the defendant was guilty of negligence was without support, and the complaint should have been dismissed.

The judgment is reversed and a new trial ordered, with costs to the appellant to abide the event.

VAN BRUNT, P. J., WILLIAMS, PATTERSON and O'BRIEN, JJ., concurred.

Judgment reversed, new trial ordered, costs to appellant to abide event.

NOTE.—See note to *Hall v. Ogden City St. Ry. Co.*, *post*.

ROBERT DOSTER V. CHARLOTTE STREET RAILWAY COMPANY.

North Carolina Supreme Court, December 20, 1895.

(117 N. C. 651.)

ELECTRIC STREET RAILWAY—FRIGHTENING HORSES.

Where a horse is being driven along a highway in which is an electric railway, though it is evidently alarmed at the approaching car, the motorman in charge is not negligent in failing to diminish the speed of the car unless the animal is actually on the track in front, or the motorman has reasonable ground to believe that in its excited state it may go upon it, so as to cause a collision.

APPEAL by defendant below from judgment of Superior Court, Mecklenburg county.

James A. Bell, for plaintiff.

Burwell, Walker & Cansler, for defendant, appellant.

AVERY, J.: The plaintiff voluntarily exposed himself, his buggy and his mule to the risk of any accident which

might be caused by the animal's taking fright at the usual noise incident to running a street car by electricity, there being no testimony tending to show that the motorman wantonly or maliciously made unnecessary noise for the purpose of scaring the animal. Where a horse is being driven or is running uncontrolled along a highway parallel to a railway of any kind, though it give unmistakable evidence by its movements that it is alarmed at an approaching train or car, the engineer or motorman in charge is not negligent in failing to diminish the speed, unless the animal is actually on the track, in his front, or he has reasonable ground to believe that in its excited state it is about to go or may go upon it, so as to cause a collision. *Snowden v. Railroad Co.*, 95 N. C. 93; *Wilson v. Railroad*, 90 N. C. 69; *Carlton v. Railroad*, 104 N. C. 365. Where the engineer on a railway train actually sees a person driving a team in the direction of a crossing in his front, or in the act of passing over it, it is not his duty to stop, unless he has reasonable ground to believe that the horse or vehicle is in some way fastened or detained upon the track, or that some emergency has arisen which may be reasonably expected to cause a collision, with consequent injury to person or property. *Bullock v. Railroad*, 105 N. C. 180; *Rigler v. Railroad*, 94 N. C. 604.

It may often happen that greater care is obviously necessary to avoid injury to a loose, frightened animal (as in *Wilson v. Railroad Co.*, *supra*), that to a man in the same position, on or off a track, because, if apparently in possession of all of his powers and faculties, the man may be reasonably expected, up to the last moment, to avoid peril, while the excited animal is as ready to rush into as to run away from danger.

There was no testimony tending to show that the mule was upon the track in front of the car, or that there was any apparent danger that it would rush upon it. The motorman was the servant of the quasi-corporation, which

enjoyed privileges granted to it by the Legislature in consideration of its duty to transport passengers safely and more speedily than they are ordinarily carried in vehicles drawn by horses. People who pay their money in the reasonable expectation of being carried expeditiously are not to be delayed by every person who ventures to test the nerve of a horse or a mule by driving it along the same street on which a company runs its street cars by electricity. Where persons subject themselves to such risks, and no collision with the moving car ensues, injuries caused by the conduct of frightened animals are deemed in law to be due directly to their own want of care. Where the animal rushes upon the track in front of the car, the company is answerable for the consequences of a collision only where, by proper watchfulness on the part of the motorman, the danger might have been foreseen and the injury avoided by using the appliances at his command to stop the car. Where there is apparent danger of running over or coming in contact with persons or animals, either the principle announced in *Pickett v. Railroad*, decided at this term, or that laid down in *Wilson v. Railroad Co.*, *supra*, may be applicable. But it does not appear that the plaintiff was on or very near to the track. The car, according to the undisputed testimony, was stopped 15 feet distant from the place where his mule had stopped.

There was error in refusing to charge the jury that in no aspect of the evidence could they find in response to the issue that the injury was caused by the negligence of the defendant. For this error a new trial must be awarded.

New trial.

NOTE.—See note to *Hall v. Ogden City St. Ry. Co.*, *post*.

SARAH SMITH V. CITY AND SUBURBAN RAILWAY COMPANY.*Oregon Supreme Court, Sept. 21, 1896.*

(29 Oregon, 539.)

**ELECTRIC STREET RAILWAY—CONTRIBUTORY NEGLIGENCE OF TRAVELER.
WHEN PERSON CEASES TO BE PASSENGER.**

It is presumptively negligent for a pedestrian to attempt to cross the track of an electric street railway, in the day time, without looking or listening for an approaching car, when if he had looked or listened he could have escaped injury.

The relation of passenger and carrier ends when the person has safely landed from the car.

Cases of this series cited in opinion appearing in bold faced type: *Carson v. Federal St. &c. Ry. Co.*, vol. 4, p. 470; *Creamer v. West End St. Ry. Co.*, vol. 4, p. 476.

APPEAL by defendant from judgment of Circuit Court, Multomah county.

Rufus Mallory, for appellant.

A. H. Tanner, for respondent.

STATEMENT of the case.: This is an action by Mrs. Sarah Smith to recover damages for an injury caused by the alleged negligence of the City and Suburban Railway in the operation and management of one of its electric cars. The defendant's car line on Morrison street, in the city of Portland, consists of two tracks, about four feet apart. The cars going east use the south, and those going west the north, track. On August eleventh, eighteen hundred and ninety-two, the plaintiff boarded an east bound car, intending to ride to Union avenue, her destination being a point thereon south of Morrison street. At

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the time she took passage on the car the conductor was requested to put her off at Union avenue, but, through some mistake or carelessness, carried her by that point. On the return trip of the car she was safely landed in the street at the intersection of said avenue, as desired, whereupon she walked around the rear end of the car upon which she had been riding, started across the street, and in attempting to cross the south track was struck and injured by a car going east. The plaintiff's version of the accident is as follows: "I got into the car, and went until they stopped, and told me to get out. He (the conductor) put me off the car. I stepped to one side a little. He (the conductor) said: 'This is the place where you get off,' and he put me off. He helped me down. I turned myself around to look, for I felt like I was turned around; did not know which way to go. Then I made a few steps eastward, and made a quick pass, right back to the end of the car—right close to the car—I saw nothing, and heard no bell. I looked to see—I turned around to see where I was, and when I saw where, I was going to go up south. I looked again to see if I could see anything. Seeing nothing, I thought now I will go past right quick, and when I passed the car looked as if it was an arm's length from me, the one that hit me. I had never seen it before it was that near to me. Heard no bell or any warning given to me at all; heard nothing. My hearing is good. If there had been a bell rung, I could have heard. My hearing is pretty good. The car I got out of was still standing there. I waited a short time, and it still stood there, and I thought then, I will go past behind the car. I don't remember a thing that happened afterwards. When I saw the car so near me, I think I made an effort to get out of the way, but it was so close I could do nothing. Don't know how the car struck me." The motorman in charge of the latter car says the first time he saw the plaintiff she was about twenty-five feet away from

the car. "She stepped from behind the west bound car into the middle of the track on which my car was going. She stood in the middle of the track for a few seconds, and looked very much bewildered and frightened. She then recovered herself, and started to go back; but it was too late." On trial there was a verdict and judgment for the plaintiff, from which defendant appeals. Reversed.

BEAN, J.: The plaintiff claims and alleges that her injury was caused by the negligence of defendant in running its cars at a dangerous and unlawful rate of speed, in not giving timely signals of its approach to the street crossings, and in not providing it with suitable brakes. The defendant denies these allegations of negligence on its part, and avers that the injury was caused solely by the plaintiff's own negligence in attempting to cross the track without looking or listening for the approaching car. There was sufficient evidence to go to the jury on the question of defendant's negligence, and the principal question on this appeal is the alleged error of the trial court in refusing to instruct the jury that: "If plaintiff failed to look to see if a car was approaching before she attempted to cross the track, and by reason of such failure stepped upon the track, and was struck by an approaching car, which she could have seen and avoided by looking, then she was guilty of contributory negligence, and cannot recover in this action." That this proposed instruction is good law, under the facts of this case, it seems to us can admit of no reasonable question. Counsel for plaintiff seek to justify the rulings of the trial court by claiming that the imperative rule for railway crossings, that a traveler must look and listen, is not applicable as a hard and fast rule to crossing of street car tracks in the public streets of a city, but the question of care in such cases is always for the jury. Upon this subject there is some conflict in the decisions, but the doctrine which seems to be supported by authority and reason, at least with reference to electric

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and cable railways, is that "it is presumptively negligent on the part of a pedestrian to attempt to cross the track without looking or listening, when, if he had looked and listened, he could have discovered the approach of the car in ample time to avoid injury." Booth, St. Ry. Law, sec. 312; *Fenton v. Railroad Co.*, 126 N. Y. 625; *Meyer v. Railway Co.*, 6 Mo. App. 27; *Scott v. Railroad Co.* (Sup.), 16 N. Y. Supp. 350; *Davenport v. Railroad Co.*, 100 N. Y. 632; *Carson v. Federal St. &c. Railway Co.*, 147 Pa. St. 219; *Buzby v. Traction Co.*, 126 Pa. St. 559; *Sheets v. Railway Co.*, 54 N. J. Law, 518; *Schulte v. Railroad Co.*, 44 La. Ann. 509.

This doctrine is but an application of the universal rule which requires due and ordinary care in crossing a public street as in all other transactions of life. It is manifestly dangerous for a pedestrian about to cross a street car track to omit to exercise his ordinary senses, and a failure to do so is everywhere regarded as negligence on his part. He may not be required to stop, look and listen before crossing, but it is certainly necessary for him to look where he is going, unless there is something in the circumstances of the case or in his surroundings which will excuse him. "Even on the sidewalk, specially devoted to the use of foot passengers," says MITCHELL, J., "a man is bound to look where he is going; and this duty is still more imperative when he is about to cross the middle of the street, where horses, wagons and cars have equal rights with himself, and where he is bound to take notice of such other rights, and to use his own with due regard thereto." *Buzby v. Traction Co.*, *supra*. In the case before us there was nothing in the facts to excuse the plaintiff from exercising her senses. The accident occurred in the daytime, at a place where the view of the track was not obstructed for a space of three or four blocks, except where the car from which she had just alighted would obstruct the vision, and, if she had waited until the car moved on, she would

have had an uninterrupted view of this space. She did not do so, but, according to her own statement, passed hurriedly along and around the rear end of the car, across the space between the two tracks, from which the approaching car could readily have been seen, and on to the track immediately in front of the car. If she did all this without looking to see where she was going, or whether a car was approaching, she was guilty of such contributory negligence as will, in our opinion, bar a recovery, and the jury should have been so instructed even if it be conceded that it may not be negligence in all cases for a pedestrian to attempt to cross a street car track without looking and listening for approaching cars.

The defendant also requested the court to instruct the jury that the relation of passenger and carrier ended when the plaintiff had safely landed from the car, and thereafter the defendant owed her no duty other or different from that which it owed to any other pedestrian on the street. The court refused to give this instruction, and charged the jury that, as a general rule, "the duty of the carrier is completed when he takes a passenger to the point of destination, and stops a sufficient time to allow him to alight and free himself from the car and track of the carrier; and until such relation of the passenger and carrier ceases, it is the duty of the carrier to use the highest degree of care and diligence to protect the passenger from injury, and to land him safely at his destination. And if you find from the evidence that the plaintiff had not been properly landed by the defendant, and freed from the car or track upon which she was a passenger, then it was the duty of the employes of the defendant upon the car in which she was a passenger to use all reasonable means to prevent the car coming in the opposite direction from running upon or striking her or doing her injury, and, if they neglected their duty in that respect, and the injuries of plaintiff were occasioned

thereby, the defendant would be liable, and your verdict should be for the plaintiff." By this instruction the jury were left to determine as a matter of fact whether the relation of passenger and carrier existed at the time of the accident, although the pleadings and evidence both show—and about this there is no dispute—that plaintiff had alighted from the car in a place of safety, and had started on her journey across the street, before she was struck by the car going east. Under the facts thus admitted, she was clearly not a passenger when the accident occurred, and the court should have so instructed the jury. The relation of passenger and carrier ceased when she alighted from the car, and thereafter the defendant owed her no other or different duty than it owed to any other ordinary traveler. Booth St. Ry. Law, sec. 326; *Creamer v. West End St. Ry. Co.*, 156 Mass. 320; *Buzby v. Traction Co.*, 126 Pa. St. 559. A public street is in no sense an approach or passenger station for the condition or safety of which a street railway company is responsible; and when a passenger steps from a car to the street he becomes a mere traveler upon the highway, and the company is not responsible to him as a carrier for his safety thereafter. Under the pleadings and the admitted facts, the plaintiff had ceased to be a passenger before the accident occurred, and the case presented is that of an ordinary traveler upon the highway.

There are several other errors assigned in the record, but it is thought unnecessary to consider them at this time, as a new trial must be ordered.

Reversed.

UPON REHEARING, NOV. 9, 1896.

BEAN, J.: Notwithstanding any evidence which may have been given by the plaintiff or other witness tending to show that she looked for an approaching car before attempting to cross the track, the question as to whether she did in fact do so was for the jury, under all the cir-

circumstances of the case, and the court was not justified in refusing to give the instruction in question on the ground that there was no evidence upon which to base it. The case of *Texas Pacific Railway Co. v. Gentry*, 163 U. S. 353, is not at all in point. In that case the deceased, an employe of the defendant, was killed in crossing the track of its railroad at night, while going to work. No one witnessed the accident, and the court held that in the entire absence of evidence as to the deceased having, or not having, looked for the approach of the car before crossing the track, the trial court was justified in refusing an instruction to the effect that if, by looking and listening, he could have known of the approach of the engine and car in time to have kept off the track, and prevented the accident, and failing to do so, the jury must find for the defendant, for the reason that in such case the law presumed that he did look and listen. In this case, however, there were numerous witnesses who saw the accident and testified to the circumstances under which it occurred, and hence there was no room for indulging in the presumption referred to.

Nor do we think the instruction in question was given in substance by the court in its general charge to the effect that if the accident "was caused by the carelessness or negligence of the plaintiff," or if she did not "use proper care and caution to ascertain whether a car was approaching," before attempting to cross the track, she cannot recover. The instruction as given contained nothing more than the featureless generality that plaintiff must exercise ordinary care and caution, leaving the jury to determine what would satisfy that requirement, while the instruction asked and refused defines precisely what would be want of ordinary care under the circumstances of this case, and, if given, would have furnished the jury with a criterion by which to determine whether plaintiff exercised such care or not.

It is suggested that some of the expressions in the opinion in reference to the facts will, on a retrial, be greatly prejudicial to the plaintiff, and particluar reference is made to the statement therein that the accident occurred at a place where the view of the track was unobstructed for a space of three or four blocks, except the car from which the plaintiff had just alighted would obstruct the vision. This is in accordance with the facts, as we understand the record before us, but, if we are mistaken in that respect, no harm can come from it on another trial, which must be had on the evidence to be then presented, and not as given on the first trial.

Counsel seems also to think that the court intended to criticize the plaintiff for not waiting until the car from which she had alighted moved on, before attempting to cross the track, but in this he is mistaken. We only intended to state the facts from the record as we understood them, and to hold that if, under the circumstances of the case as thereby disclosed, the plaintiff attempted to cross the track without looking to see whether a car was approaching, she was guilty of such contributory negligence as would bar a recovery. The petition for a rehearing is denied.

Rehearing denied.

NOTE.—See note to *Hall v. Ogden City St. Ry. Co.*, post.

GEORGE HARKINS, BY HIS NEXT FRIEND, v. PITTSBURGH,
ALLEGHENY & MANCHESTER TRACTION COMPANY.

Pennsylvania Supreme Court, Jan. 6, 1896.

(173 Pa. St. 149.)

ELECTRIC STREET RAILWAY—INJURY TO INFANT IN STREET—NEGLIGENCE.
Testimony that the motorman of a trolley car, at the time his car ran over and injured a child, was looking at persons assembled at the side of the street and so failed to see the child in time to prevent the injury, raises a question of negligence for the jury.

APPEAL by defendant below from judgment of Allegheny County Court of Common Pleas.

A. M. Neeper, for appellant.

Thomas M. Marshall, Jr. (*Frank P. Sproul*, with him), for appellee.

FELL, J.: This action was brought by a minor child, to recover for injuries sustained by being struck by one of the defendant's cars. The facts appearing in evidence are substantially the same as those in *Clyde Harkins v. Same Defendant*, 173 Pa. 146 [next case], in which an opinion has been filed. The errors alleged are in not withdrawing the case from the jury on the ground that there was no evidence which would sustain a verdict for the plaintiff, and in not specifically instructing the jury that the evidence in relation to the speed of the car was insufficient to sustain a finding that the defendant was negligent in that regard.

As there was testimony that the motorman, at the time of the accident, was looking at persons assembled at the side of the street, and for that reason failed to see the

plaintiff in time to stop the car, and as no question of contributory negligence arose, the case could not have been withdrawn from the jury.

It was not error to refuse the instruction asked as to the speed of the car. There was testimony that the car was running very rapidly through a crowded thoroughfare. The instruction on the subject in the general charge was highly favorable to the defendant. In *Yingst v. Railway Co.*, 167 Pa. St. 438, relied on by appellant, the injury resulted from the frightening of the plaintiff's horse; and one of the questions raised was whether the railway company was negligent in running its cars at excessive speed, and it was held that there was no evidence of excessive speed. The circumstances of the two cases are not alike, and the degree of care required was not the same. In one case the speed of the car was wholly unimportant, except as it contributed to causes which produced an unexpected result, the fright of the horse; in the other the rate of speed was of primary importance, as indicating the degree of control which the motorman exercised over the movements of the car in a crowded street, and when in a position demanding a high degree of care.

The judgment is affirmed.

NOTE.—See note to *Hall v. Ogden City St. Ry. Co.*, post.

**CLYDE HARKINS v. PITTSBURGH, ALLEGHENY & MAN-
CHESTER TRACTION COMPANY.***Pennsylvania Supreme Court, Jan. 6, 1896.*

(178 Pa. St. 147.)

**ELECTRIC STREET RAILWAY—INJURY TO CHILD ON TRACK—CONTRIBUTORY
NEGLIGENCE.**

It is not contributory negligence as matter of law for a mother to intrust a child three years old to a brother, fourteen years of age, who was in the habit of caring for him, to go across a street in which is the track of an electric street railway.

APPEAL by defendant from judgment of Allegheny County Court of Common Pleas.

A. M. Neeper, for appellant.

Thomas M. Marshall, Jr., (*Frank P. Sproul*, with him,) for appellee.

FELL, J.: This action was brought by a father to recover for expenses and loss of services resulting from an injury to his minor child. The only assignment of error to be considered relates to the refusal of the court to direct a verdict for the defendant. The testimony in relation to the rate of speed at which the car was moving, to obstructions in the street, to the attention which the motorman gave to his duties, and to the question whether the child who was injured came so suddenly upon the track, from behind a wagon, as not to be seen in time to stop the car before he was struck, was conflicting and contradictory. If credit is given to the plaintiff's witnesses, the car was

moving at an unusually high rate of speed, the view of the whole street in front was unobstructed; the child was seen, by passengers in the car, walking from the foot pavement to the track, and would have been seen by the motorman, if he had properly attended to his duty, long enough before the point of the accident was reached to have enabled him to stop the car; the motorman, instead of looking ahead, was looking at a house at the side of the street, where a number of persons had assembled, and he was negligent in not sooner stopping the car after the child was struck and thus avoiding the more serious injuries which resulted from the child's clothing becoming entangled in the machinery. This testimony was sufficient to carry the case to the jury, unless it appeared that there was contributory negligence. The child injured was two years and eleven months old. His mother had asked her brother, the child's uncle, a boy fourteen years old, to go to a store on the opposite side of the street for a loaf of bread. The child begged to go with him. For greater safety the mother carried the child across the street, and left him on the pavement, in the care of his uncle. The two children walked down the street together, a short distance, when the younger asked the older to get him a piece of ice from a wagon standing on the other side of the street. Cautioning him to remain where he was, the older boy ran across the street, got the ice, and started to return. As he stepped down from the wagon he noticed that the child had started to follow him, and was then on the car tracks. The car was at the distance of the width of two or three stores, and moved so rapidly that the child was struck before he could reach him.

The only question raised at the trial, which has been argued here, is whether the parents of the child who was injured negligently permitted him to go upon the street without a suitable protector. The defense was confined

to this ground, and the question of imputable negligence was not considered, and is not now raised. The older boy was fourteen years of age. He was a member of his sister's family and had frequently aided in taking care of the child. The presumption is in favor of his capacity as a care-taker, and there was no evidence of his incapacity, unless it be found in the particular occurrence under investigation. The question was for the jury, and the case should not have been withdrawn. The judgment is affirmed.

NOTE.— See note to *Hall v. Ogden City St. Ry. Co.*, *post*.

BARBARA FLEISHMAN, BY NEXT FRIEND V. NEVERSINK
MOUNTAIN RAILROAD COMPANY.

Pennsylvania Supreme Court, March 27, 1896.

(174 Pa. St. 510.)

ELECTRIC STREET RAILROAD—INJURY TO TRAVELER.

It is not incumbent upon a motorman in charge of a trolley car, seeing a child standing in the gutter, and there being no appearance of its intention to cross the street, to stop the car or slacken its speed. And the company cannot be held liable for injuries to the child, due to its sudden attempting to cross the track immediately in front of the car.

APPEAL by plaintiff from judgment of Court of Common Pleas, Berks county.

At the trial it appeared that at about eight o'clock on the evening of June 22, 1892, the plaintiff, at that time about six years of age, was struck and injured by one of defendant's electric cars. Just before the accident plaintiff had started across the street, and then stopped. When

the car which struck her was about ten feet from her, she turned suddenly and ran upon the track, and was struck upon the shoulder. It appeared that from the time the child started to run towards the track, until the car was stopped, the car traveled about eighteen feet. The evidence as to the speed of the car was conflicting.

Plaintiff's points, among others, were as follows:

3. "The defendant's motorman having, as a witness for the defendant, testified he first saw the plaintiff on the curbstone, and that he saw her stepping from the curbstone into the gutter, which was in the direction of the railway track—if the jury believe that the action and attitude of the child were such as should have indicated to a reasonably cautious man an intent to get upon or cross the track, it is the motorman's duty by checking the speed of the car, by ringing of the gong, or by other proper and reasonable precautions, to have guarded against the accident. *Answer.* This point I would affirm, if the facts were correctly stated in it, but there is nothing in the evidence of the motorman, or any other witness to this accident, to show the action of this child indicated an intention to cross the street, until within ten feet from the place of contact; and then he swears, together with the witnesses who were there at the time, that he did all he could to prevent the accident. [1]

5. The defendant's motorman having, as a witness for the defendant, testified that he turned off the power, and tried to slacken the speed of the car by applying the brakes, only when he was within ten feet of the plaintiff, if the jury believe that the defendant could have avoided the accident if the motorman had slackened the speed of the car as soon as he saw the child in the gutter, or upon the street, then it was negligence in not having done so. *Answer.* This point I cannot affirm. It was not incumbent upon the motorman to slacken the speed of the car, or to stop the car, simply

because he may have seen somebody standing in the gutter. While she was standing in the gutter, there was no possibility of running over her, and there is no evidence to show any attitude or anything in the manner of the child that would indicate to anybody that she was about to run across the street, or upon the track, or in front of the car. [2] The court directed the jury to find a verdict for the defendant. [3]

Edward S. Kremp, for appellant.

P. S. Zieber and Baer & Snyder, for appellee.

Per CURIAM: We agree with the learned court below in their views of this case. There is no evidence of negligence on the part of the motorman. He could not anticipate the sudden action of the child in attempting to cross the track immediately in front of the car, and his failure to do so is not negligence.

Judgment affirmed.

NOTE.—See note to *Hall v. Ogden City St. Ry. Co.*, *post*.

MICHAEL EVERS AND WIFE V. PHILADELPHIA TRACTION
COMPANY.

Pennsylvania Supreme Court, July 15, 1896.

(176 Pa. St. 376.)

ELECTRIC STREET RAILWAY—DUTY TO TRAVELERS—CONTRIBUTORY NEGLIGENCE OF PARENTS.

While the movement of trolley cars rapidly between crossings is not of itself evidence of negligence (as is such running at crossings), such movement in a city street requires vigilant lookout of those in charge of cars.

In a case in which a child six years old was run down and killed by a trolley car, *held*, that the questions of negligence of the company and

contributory negligence of the child's parents were properly submitted to the jury.

Instruction to the jury that "it is the duty of parents to look after their children of tender years, and not to turn them out amid the dangers from accidents which occur upon crowded streets, and where trolley cars are running about, filled with the suggestions of danger to the lives and limbs of children; they ought to exercise reasonable and proper care"—*held* sufficiently favorable to the defendant.

APPEAL by defendant below from judgment of Court of Common Pleas, Philadelphia county. Facts stated in opinion.

J. L. Vanderslice and J. Howard Gendell, for appellant.

Wendell P. Bowman, for appellees.

DEAN, J.: On Sunday forenoon, the 17th of September, 1903, Michael Evers, four and one-half years old, the son of plaintiffs, was run over and killed by defendant's street car on Front street, between Bainbridge and Catherine, in the city of Philadelphia. The plaintiffs lived at the corner of Meade and Swanson streets; the latter being parallel with Front, and near to it. Meade is a narrow street or alley, running from Front to the river. The family of plaintiffs was made up of the parents and eight children. The mother had washed and dressed Michael, the deceased child, and then had permitted him to go with his elder brother, Thomas, to a coal box on the lower side of Meade street, while she proceeded to wash and dress another of her children. About the time she had finished this one, two other of her children, girls, returned from church; on inquiry of them, she was told the two boys were still by the coal box; she then directed one of these to tell the boys to come home; one of the sisters immediately did as directed by the mother; the elder boy obeyed, but the younger refused; the sister, on reporting to the mother, was immediately sent to bring him home; in this interval, however, the boy had left the coal box, and crossed over to

the west side of Front street, a half square distant, and then started to run across again to the east side, when he was run over by defendant's car. The father peddled brooms with a horse and wagon, and at times manufactured them himself in the house where he lived; two of his daughters had employment, and earned a living, but the family was in moderate circumstances. The parents brought suit against the defendant for damages, alleging the death was caused by its negligence in running the car at an unusual speed; further, that when the child started from the west side of Front street to run across the track to the east side, he was in plain view of the motorman for a distance of sixty feet; that although witnesses on the sidewalk saw the danger, and screamed to him, the motorman made no effort to stop the car, and appeared to be looking westward, in another direction. There was much negative evidence that no warning of the approaching car was given. The motorman himself admitted he was a new hand on city streets, having been in employ of defendant only four days, and that this was his first trip without an instructor.

At the trial the court below submitted the evidence to the jury to find, 1, whether defendant was negligent; 2, whether the parents were guilty of contributory negligence in not exercising proper watchfulness over their child.

The verdict was for plaintiffs, and we have this appeal by defendant, in which there is the single assignment of error that the court should have peremptorily directed a verdict for defendant on two grounds: 1, Because there was no evidence of negligence on part of defendant; and 2, because the evidence necessarily warrants no other inference than that of negligence on part of the parents.

As to the first proposition, it is based on the incorrect assumption that there was no evidence tending to show the motorman failed to fully perform his duty. Eight

witnesses testify this child, in broad day, started from the curb, which is about seven feet from the rail, to cross the street, when the car was fifty to sixty feet distant. Eugene O'Neill, an intelligent witness, a foreman of stevedores, testified he was sitting at a side window of a house, looking towards the west side of Front street, and about thirty to forty feet distant; saw the child start from the curb to cross; then the car came into view, running rapidly towards the child; the witness hallooed to the motorman, who had been looking to the west, and not in front of him, and who then turned his head to look in front, when he hallooed the second time, and just then the child was run over. This is, in substance, the testimony of several other witnesses who saw the child attempting to cross, and who saw the car when it approached him. Whether, under the circumstances, the motorman failed to exercise care, was a pure question of fact to be determined by the jury. That the car moved rapidly between crossings was not of itself evidence of negligence, but, clearly, rapid movement of a car on the street of a city requires a vigilant lookout by those in charge of it. The cars have the right to expeditiously transport passengers on the surface of the streets, but that gives them no exclusive right to the surface occupied by their tracks. Neither at crossings nor between them is the public right relinquished. It is only subordinate to that of the railway company. The fact that more caution should be exercised in running over crossings than on the streets between them warrants no inference that the car can be run without caution except on approaching crossings; in the one case, rapid running is of itself evidence of negligence; in the other, it is not. Assume, then, although running with comparative rapidity, the car was not running at a negligent, and, therefore, unlawful speed, the question still recurs did the motorman exercise care according to the circumstances? If the witnesses be believed, he could, by merely looking

in front of him, have seen the peril of the child, and could have saved its life by stopping the car. The case, on its facts, is almost the same as *Schnur v. Traction Co.*, 153 Pa. St. 29, where we held the question of negligence was for the jury. In that case the boy run over was six years old, and it was alleged the gripman did not see him; but there was evidence by a number of witnesses that they saw him when the car was sixty or seventy feet off. There was no reason why the gripman, whose special duty it was to see the track in front of him, should not have seen what those on the street saw.

The cases cited by appellant are not applicable to the evidence, as here offered. In *Chilton v. Traction Co.*, 152 Pa. St. 425, the child unexpectedly turned and ran into the car. In *Flanagan v. Railway Co.*, 163 Pa. St. 102, the driver of a horse car was tending strictly to his duty when a little girl, seven years of age, ran in front of the car, when he was doing his best to stop it, and did stop it but an instant too late to avoid the accident. As we have already noticed, the simple question here was whether this motorman, by the exercise of care under the circumstances testified to, could have avoided this accident. That was fully and carefully submitted to the jury, and they have found defendant was negligent, and we must adopt that as the truth.

This being a child, contributory negligence cannot be imputed to him. If an adult had been injured in the attempt to cross a street railway track in front of a rapidly moving car, fifty or sixty feet distant, in charge of a negligent motorman, quite another question would have been raised. As to the alleged negligence of the parents, we are of opinion the court committed no error in also submitting that question to the jury. Clearly, if the evidence were undisputed, that these parents had habitually permitted a child of this age to play on the street on which ran the trolley car, there could have been no recovery; or,

if the evidence had shown they did not, on that day, under the circumstances, exercise the care which a child of such tender years demanded, there could have been no recovery. But it will be noticed the family was a large one, and not in affluent circumstances. The mother had only such aid in caring for the younger children as those older could give. She washed and dressed this one, and permitted him, with his brother, eight years old, to go to the coal box on Meade street, where there was no railway track; when she had completed her motherly duty to the second child, and one of the daughters had returned from church, she sent for both children; the oldest returned; the deceased one refused; she immediately sent again for him, but before he was reached the caprice and heedlessness of childhood had led him to Front street, where he was killed. It was not for the court to say, from this evidence, the parents were negligent. We think the following instruction of the learned judge of the court below on this evidence was all that defendant had the right to ask: "It is the duty of parents to look after their children of tender years, and not to turn them out amid the dangers from accidents which occur upon crowded streets, and where trolley cars are running about, filled with the suggestions of danger to the lives and limbs of children. They ought to exercise reasonable and proper care, and one of the questions you are called upon to determine is as to whether or not these parents did exercise such due care in looking after this child."

The assignment of error is overruled, and judgment affirmed.

NOTE.—See note to *Hall v. Ogden City St. Ry. Co.*, post.

LIZZIE A. WOECKNER v. ERIE ELECTRIC MOTOR COMPANY.*Pennsylvania Supreme Court, July 15, 1896.***ELECTRIC STREET RAILWAY—DUTY TO CHILD IN STREET.**

The motorman of a trolley car saw a child three years old start from the sidewalk toward the track twenty-five feet distant. There was testimony that he brought the car nearly to a full stop, and then, seeing the child turn from the track, released the brake. The child suddenly turned across the track and the car struck her. *Held*, that the question of the motorman's negligence was properly submitted to the jury.

APPELL by defendant below from judgment of Erie County Court of Common Pleas. Facts stated in opinion.

S. A. Davenport and J. M. Sherwin, for appellant.

S. M. Brainerd, Geo. H. Higgins, T. A. Lamb and E. A. Walling, for appellee.

FELL, J.: The plaintiff was three years and ten months of age at the time of her injury. Accompanied by her brother, who was ten years old, she attempted to cross a street on which the cars of the defendant were running. The street was 100 feet wide, with a roadway 64 feet in width. The car tracks were 25 feet from the curb, and the street was at the time clear of obstructions. The plaintiff crossed the street diagonally from the curb to the tracks, in the direction in which the car was running. She was seen by the motorman when she started to cross, and when the car was 100 feet from the point where she reached the tracks. The electric current had been turned off, and the car was running slowly, on a slightly declining grade. The testimony in the plaintiff's behalf was that she had not changed her course or stopped from the time

she left the curb until she was struck by the car, and that no effort was made by the motorman to stop the car until she was within a few feet of the tracks. The testimony produced by the defendant tended to show that the plaintiff, when within five or six feet of the tracks, and eight or ten feet from the car, turned towards the sidewalk; that the motorman had brought the car nearly to a full stop, and then, assuming that there was no danger of an accident, released the brakes; and that, as the car moved forward, the plaintiff suddenly turned, and ran in front of it.

Because of her age, contributory negligence could not be imputed to the plaintiff. If her witnesses were correct in their statements, the motorman was guilty of negligence in not attempting to stop the car until the moment of the accident. If the defendant's witnesses were correct, the only debatable ground now presented by the record is whether the plaintiff, by changing her course after having turned towards the sidewalk, came so suddenly and unexpectedly upon the track as to relieve the motorman from the charge of negligence, and the company from liability. The case is not that of a child coming suddenly in front of a moving car at a place where its presence on the street was not to be expected. This child was seen by the motorman approaching the tracks in front of his car. He knew of the danger in time to guard against it. In a measure he did so. According to his own testimony, he had full control of the movements of the car. He brought it almost to a stop, and could readily have stopped it entirely before the child reached the track. Thus far he was careful. But, when he saw the child turn from the tracks, he released the brakes, and let the car go forward on a down grade. She was then within ten feet of the front of the car, and within five feet of the tracks. She was running thoughtlessly and playfully in front of her brother, looking back over her shoulder towards him, and

away from the direction in which the car was coming. Her brother, understanding the danger of which she was unconscious, was running after her, and was within a very few feet of her. If the motorman had held the car a moment, or taken the brakes partly off, and allowed it to move forward slowly, the accident would have been avoided. When asked, "Why did you not wait until she got back a safe distance from the track?" he replied: "She was going on. We don't have time to stand around. When she started back from the curb, I took it for granted she was going back." Whether he took too much for granted, and acted imprudently, was for the jury. If the jury accepted the statements of the defendant's witnesses, this was the turning point of the case; and it was submitted by the learned judge with great care and ability, and with entire fairness to both parties. The judgment is affirmed.

NOTE.—See note to *Hall v. Ogden City St. Ry. Co.*, *post*.

CITIZENS' RAPID TRANSIT COMPANY. v. SOLOMON SEIGRIST.

Tennessee Supreme Court, January 30, 1896.

(96 Tenn. 119.)

ELECTRIC STREET RAILWAY—INJURY TO TRAVELER.

A traveler approaching an electric street railway is not bound, as matter of law, to look carefully up and down the track before venturing upon it. A traveler approaching the crossing of an electric street railway, while bound to be careful on his own part, has the right also to assume that those having charge of an approaching car will be careful. Therefore held that a traveler who, when ten feet from the track, looked and saw a car approaching 200 or 250 yards away, was not guilty of contributory negligence, as matter of law, in attempting to cross the track ahead of the car without looking a second time for it.

Rapid Transit Co. v. Seigrist.

A motorman in charge of an electric car who, knowing he is approaching a public crossing, and seeing a traveler approaching the track and near it, fails to have his car under reasonable control, is guilty of negligence. Cases of this series cited in opinion, appearing in bold faced type: *Watson v. Minneapolis St. Ry. Co.*, vol. 4, p. 510; *Hickman v. Union Depot R. Co.*, vol. 4, p. 463; *Bernhard v. Rochester Ry. Co.*, vol. 4, p. 506; *Shea v. St. Paul City Ry. Co.*, vol. 4, p. 481.

APPEAL by defendant below from judgment of Circuit Court, Davidson county. Facts stated in opinion.

Steger, Washington & Jackson, and *P. D. Madden*, for Transit Company.

Lemuel R. Campbell and *J. S. Pilcher*, for Seigrist.

CALDWELL, J.: Solomon Seigrist brought this suit against the Citizens' Rapid Transit Company to recover damages for personal injuries which, he averred, it wrongfully and negligently inflicted upon him. The trial, before court and jury, resulted in verdict and judgment in favor of the plaintiff for \$650, and the defendant, after motion for a new trial had been overruled, appealed in error.

The Citizens' Rapid Transit Company was a regularly chartered street car company, operating electric street cars upon Cedar street in the city of Nashville, and upon the Charlotte pike to West Nashville, by one continuous line. Both Cedar street and the Charlotte pike were public highways, properly in constant use by the general public, as well as by the street car company.

Solomon Seigrist, the plaintiff below, was a baker, residing in West Nashville, and furnishing bread daily, from his covered wagon, to his customers in Nashville.

The injuries complained of in this case were caused by a severe collision, in which one of the street car company's outgoing cars ran against and overturned his wagon, while he, as driver, returning to his home, was passing across the company's track at a regular and well known crossing

on the Charlotte pike. That the injuries were thus inflicted, and that they were of a serious nature, is not disputed; but the company, through its counsel, contends that the collision was the result of such negligence on the part of Seigrist as to bar his action, and, therefore, that there is no evidence to support the verdict.

What were the relative and respective legal rights and duties of the two parties at the particular time and place? Undoubtedly, they both had the legal right to use that part of the public highway upon which the collision occurred; but, since they could not use it at the same moment of time, it was the duty of each to so use it as not to injure the other, or unreasonably impede the other's use. The right of neither was superior to that of the other. The duty of neither was more exacting than that of the other. Their rights and their duties were equal. Both were bound to exercise reasonable care and diligence to prevent a collision, and each was allowed to assume that the other would do so, and to act accordingly. It was the duty of Seigrist to look and listen, and to have his horse under reasonable control, as he approached the crossing; and so it was the duty of the motorman to survey the highway ahead of him, and to have his car under reasonable control as he approached the crossing. Neither one, reaching the place first, would have been under any obligation to stop and wait for the other to approach and pass; but either, in that situation, would have been authorized to proceed on his way, assuming that the other, being in reasonable control of his vehicle, and otherwise in the exercise of ordinary care, as he should be, would not collide with him; and no mistake he might have made in that rightful assumption could be charged to him as negligence, unless the lack of such control and care on the part of the other person was apparent to him at the time. Neither party, in such a case, could excuse himself for going into obvious danger if he knew it was impending.

In his late work on Street Railways, at section 304, Booth says: "As already stated, as a general rule, especially between street crossings, cars have a right of way superior to that of other vehicles and pedestrians, this preferential right to be exercised in a reasonable and prudent manner. But this rule does not apply to crossings of tracks at street intersections. There the car has a right to cross, and must cross, the street; and vehicles and foot passengers have a right to cross, and must cross, the railroad track. Neither has a superior right to the other. The right of each must be exercised with due regard to the right of the other, and in such a careful manner as not unreasonably to abridge or interfere with the right of the other. This equality of right, however, does not absolve one who is about to cross the tracks from the duty of taking proper precautions to avoid accidents."

Another short statement of the law as to injuries at street crossings is as follows: "It is generally held that street railroads have no superior right of way over vehicles at street crossings, and the company will be liable for negligence of its employees in failing to have the car under control at such place, thereby causing injury to persons with vehicles; and the question of negligence and contributory negligence is for the jury. This has been held in regard to electric cars. *Watson v. Minneapolis Street Railroad Co.*, 53 Minn. 551; *Hickman v. Union Depot Railroad Co.*, 47 Mo. App. 65; *Buhrens v. Dry Dock, &c. Railroad Co.*, 53 Hun, 571; *Bernhard v. Rochester Railroad Co.*, 68 Hun, 369. And the same has been held in regard to cable car companies. *Pope v. Kansas City Cable Railroad Co.*, 99 Mo. 400. And the same was held with regard to horse car companies. *O'Neil v. Dry Dock, &c. Railroad Co.*, 129 N. Y. 125; *Hicks v. Citizens' Railroad Co.*, 25 L. R. A. 508, 509, note.

In our own case of *Memphis City Railway Co. v. Logue*,

it was said that "the public have an equal right with the company to travel on the streets; and, therefore, the company must, in using its franchises, exercise such care and caution, for the purpose of avoiding accident and endangering property and persons, as a reasonable prudence will suggest." 13 Lea, 34.

Authorities to the same general effect might be greatly multiplied, but it is hardly necessary that it should be done.

The verdict of a jury in a civil case will not be disturbed in this court if there is any evidence to sustain it. *Kirkpatrick v. Jenkins, ante*, p. 85, and cases there cited. And in order to impeach it successfully, on the ground that there is no evidence to sustain it, the complaining party must take as true the strongest legitimate view of the testimony against him, and show that it affords no support for the finding of the jury.

That is the burden that the street car company has assumed in this case; and, with that requirement in view, we will now examine some of the testimony found in this record, in the light of the rules heretofore laid down in this opinion, with respect to the relative and respective rights and duties of the two parties at the time and place of the accident.

Seigrist said, on the stand, that, when he "had gotten about ten yards from the crossing," and before attempting to pass over the street railway track, he "looked back to see if the car was coming;" that he "saw it coming some distance up the hill," seemingly "200 or 250 yards behind" him, and thought he had plenty of time to cross the track in front of the car; that "the car was moving fast," and he "was driving about four miles an hour;" that, as soon as he looked back, when ten yards from the crossing, he "started to drive" his horse across the track, and did not look back again until the front wheels of his wagon were upon the track, and he "heard the car coming very fast;"

and that, before he could get entirely across the track the car, which "was flying," struck the rear part of the wagon, on the side, with great force, throwing the vehicle from the track, upsetting it, breaking the hind wheels and other parts, and inflicting serious and permanent injuries upon his person.

This testimony was sufficient to justify the jury in finding that Seigrist had observed the requisite precautions to prevent an accident, and that he was free from culpability in the matter. Though it was his duty to look and listen as he approached the crossing, it was not incumbent on him to stop before going upon the track, when it seemed to him, upon reasonable ground, that he could pass over in safety.

The law does not require so great an amount of carefulness of a person in crossing a street railway as in crossing a steam or commercial railway, for the obvious reason that his right is greater and his danger less in the former than in the latter case. To entitle him to recover for injuries received while passing over a street railway, he need not "show, absolutely, that he looked carefully up and down the track before venturing upon it." Beach, Contrib. Neg. (2nd ed.) sec. 290; *Shea v. St. Paul City Railway Co.* (Minn.), 52 N. W. Rep. 902; *McClain v. Brooklyn City Railway Co.* (N. Y. App.), 22 N. E. Rep. 1063.

It was not negligence *per se* for Seigrist to go upon the track without looking a second time for the approaching car. When only ten yards from the crossing he saw the car, and thought it was two hundred or two hundred and fifty yards away. With that belief and the rightful assumption that the motorman saw him, and had his car under reasonable control, as he could and should have done, Seigrist, having reached the crossing first, had the right to continue his journey and cross the track without let or hindrance. Having had that legal right, and having attempted to exercise it in a prudent manner, he can in

no true sense be charged with responsibility for the consequences of his mistaken assumption that the motorman would likewise be prudent, and not run upon him. *Watson v. Minneapolis Street Railway Co.*, 53 Minn. 551.

On the other hand, the evidence is clear that the motorman was guilty of negligence proximately causing the injuries complained of, in that he, knowing of the public crossing, and seeing Seigrist near by, and approaching it, did not have his car under reasonable control, but was running at such a high rate of speed that he could not, or at least did not, stop in time to prevent a collision. *Watson v. Railway Co.*, *supra*; *Hickman v. Railway Co.*, *supra*; *Buhrens v. Railroad Co.*, *supra*; *Bernhard v. Railway Co.*, *supra*; *Pope v. Railway Co.*, *supra*; *O'Neil v. Railroad Co.*, 129 N. Y. 125. Affirmed.

NOTE.—See note to *Hall v. Ogden City St. Ry. Co.*, *post*.

W. M. HAIR v. CITIZENS' RAILWAY COMPANY.

Texas Court of Civil Appeals, Dec. 4, 1895.

FRIGHTENING HORSE BY GONG ON STREET CAR.

To continue sounding the gong upon a street car after it has become apparent that horses attached to a wagon in front of the car are frightened and rendered unmanageable thereby, is negligence. Under such circumstances it is the duty of the motorman to stop either the car or the gong.

APPEAL by defendant below from judgment of District Court, McLennan county.

Clark & Bolinger, for appellant.

Rich F. Munroe, for appellee.

FISHER, C. J.: Action for damages by appellee against appellant, operating a street railway in the city of Waco, based upon the negligence of appellant in continuously sounding the bell upon a car operated by the servants of appellant along a public street of said city, whereby the horses hauling a wagon upon which the appellee was riding became unmanageable and ran away, and as the result of which appellee was violently thrown from the wagon and injured. Judgment below was rendered against appellant for \$500.

We find that the appellee, with others, was riding on top of a load of hay, which was in a wagon being hauled by horses along a public street of the city of Waco, along which was operated a street car line by appellant; and that, at the time and in the manner as alleged in the petition, the appellant's car approached the wagon and team from behind, and, before the car reached the team, the bell or gong upon the car was repeatedly and loudly sounded, and the horses thereupon became unmanageable, and the servant operating the car saw this condition of things, or could have seen it by the exercise of ordinary diligence, and continued to ring the bell or sound the gong until the car had about passed the team, or was about even with it, which caused the horses to run away, and, when so running, the wagon struck a post, and the appellee was thrown off and injured, substantially in the manner as alleged. We find that the servant of appellant was guilty of negligence in continuing to ring the bell or sound the gong under the circumstances, and that such ringing caused the team to run away, and but for that fact the appellee would not have been injured. And we find, at the time of injury, and before, that appellee was not guilty of contributory negligence, for the reason that he was riding upon the load of hay, nor does it appear from the evidence that he was guilty of negligence in any other respect ; nor does it appear that the driver of the team

was guilty of negligence that contributed to plaintiff's injury. We find that, at the time the bell or gong was so continuously sounded, there was no occasion or reason why the appellant should continuously ring it, and that such continuous ringing was loud, and calculated to frighten the horses to the wagon. We find that the verdict is not excessive, and in every respect warranted by the evidence.

Under the facts, the plaintiff was entitled to recover. The appellant, in operating its car along the street, had the right, when occasion required, as a measure of precaution, to avert danger to its passengers and the traveling public, to ring the bell or sound the gong, and, it may be conceded, was required to also sound it when approaching a public crossing; but this duty or privilege did not warrant the bell or gong to be sounded when it appeared that it was dangerous to those traveling along the street to continue to do so. When the appellant discovered that the horses would probably become unmanageable, and likely run away, it was its duty to either stop the car, or to cease from ringing the bell or sounding the gong, when the circumstances were such as to reasonably lead to the belief that to continue to do so would likely cause the team to become unmanageable or run away, and thereby cause injury to either the person or property of some one. We think the charge of the court was correct, and fully covered the case. We find no reversible error, and, therefore, affirm the judgment of the court below. Affirmed.

NOTE.—It does not distinctly appear that the defendant in the above action was an *electric* railway company. The point decided is, however, one which affects such companies, and the case is therefore inserted.

See note to *Hall v. Ogden City St. Ry. Co.*, *post*.

JOSEPH DEDERICHS V. SALT LAKE CITY RAILWAY COMPANY.

Utah Supreme Court, Feb. 11, 1896.

ELECTRIC STREET RAILWAY—DUTY TO TRAVELER.

(Head-note by the court):

Where the testimony tends to show that the electric car of defendant was run at the rate of about 20 miles an hour, at the time of the accident, much faster than was allowable under the city ordinances, and that no gong was sounded, and no bell rung, *held*, that it is quite possible that, had the car been run at its usual legal rate of speed and the bell rung, and gong sounded, as should have been done, the accident would not have happened. And where it is also quite possible that, had the plaintiff observed that degree of ordinary care and caution which would be expected of an ordinarily prudent man under like circumstances, the accident would not have happened, still it was for the jury to pass upon the testimony, and determine, from it, the question of the negligence of the street car company, under the circumstances of this case in proof, and it was error for the trial court to grant a motion for nonsuit.

Case of this series cited in opinion, appearing in bold faced type: *Biley v. Salt Lake Rapid Trans. Co.*, vol. 5, p. 594.

APPEAL by plaintiff from judgment of District Court, Salt Lake county.

Richard B. Shepard, A. N. Cherry and H. O. Shepard, for appellant.

Rawlins & Critchlow, for respondent.

MINER, J.: This action was brought to recover damages for personal injuries to appellant, claimed to have been occasioned by the respondent in negligently running its electric street cars in the city of Salt Lake. It appears in substance, from the testimony of the plaintiff, that, at about 5 or 6 o'clock in the afternoon, in October, 1891, he was driving a horse and wagon on Eighth East street in Salt Lake City, and had stopped to water his horse at a

trough, situated about 40 feet north of the north line of Second South street, on Eighth East street, after which he moderately drove south on Eighth East street, and, after crossing the sidewalk on the north side of Second South street, he saw a car coming west at a point about 300 feet east of the crossing. At this time, he states, he thought he had plenty of time to cross the crossing. Trees obstructed his view until he had crossed the sidewalk. When his horse got to the railroad track the car was about 120 feet from the east crossing of Second South street. At this time he first noticed that the car was running rapidly. It was getting dark. That he then gave his horse a licking to get out of the way of the car. That before the car struck him, the motorman said, "Get out there." No bell was being rung and no gong was being sounded. The car struck the hind wheels of his wagon, and broke them down, on the south side of the track; his buggy was torn to pieces, one of his teeth knocked out, one of his ribs broken, and he was otherwise seriously injured. From these injuries he claims he has suffered ever since. That, prior to the accident, he was a strong, healthy man, about 42 years of age. That he paid \$22 for repairing the buggy, \$100 for medical services, and lost one and one-half month's time, worth \$8 per day. That, at the time of the accident, the car was running at an unusual rate of speed, at about twenty miles per hour. That he did not notice the speed of the car until he got on the track. The car was coming down grade, and he could not tell how fast it was running until his horse reached the track. After the car struck him it ran 80 feet west on Eighth East street, before it was stopped. The horse was gentle and accustomed to the cars. He could not state whether his horse walked or trotted when coming towards the track. That his horse's head was about 40 feet from the track when he first saw

the car. That if the car had been running at the usual rate of speed, he would have had plenty of time to cross safely. The rails were wet, and it was on down grade. Mr. Scoville, a witness for the plaintiff, testified, in substance: That he was on the corner, and saw the collision. Saw two cars coming west, one behind the other, so close that it seemed that they were racing. At this time saw plaintiff at the watering trough, going south. He was struck, and his buggy injured, and he was thrown out by the collision, which occurred near the center of the street. The car ran 125 feet west of the point of collision before it stopped. Up to the time the horse went on to the track, no effort was made to stop the car. He struck the horse with his whip when it was on the track. At the time he got out his whip, the car was about 75 to 100 feet from the buggy. He says: "In my judgment, based upon observations, the car was running 20 miles an hour, and faster than the usual rate of speed. The motorman did not put on brakes, or try to stop the car, until the instant the collision occurred. He put on brakes when it was apparent that he would hit the buggy, but not before. Did not hear any bell rung or gong sounded." He says: "I don't think he could have checked his horse after it got on the track." Mr. Watrous, a passenger, testified, in substance: Saw plaintiff driving towards the track, and close to it. Do not think the car stopped from the time it left Ft. Douglass. The car was going at a fast rate of speed. "In fact, it was going as fast as I ever saw a car go. It was going faster than any street car that I ever rode on." Saw the man on the track when the car was 75 or 100 feet away. The motorman did not try to stop the car until it was very close to the buggy. When the car stopped, it was 150 to 180 feet west of the west crossing of Eighth East street. "I remarked, on coming down from Ft. Douglass, that we were running very fast." Mr. Kelson, the conductor, testified, in substance: Saw a man approaching the track,

within a few feet of it. "I spoke to the motorman, and said, 'Look out, Sam,' and the motorman looked back at me. When the man saw his danger, he struck the horse with his whip. Saw plaintiff when he drove on Second South street. The car was then 160 feet east on Eighth East street, and over 200 feet from the place of the collision when it was stopped. We were behind time, and made no stops from the fort. If a car was in good condition, and a dry rail, it ought to be stopped in very near its length. A motorman can wind up brakes in about two seconds. I didn't hear the bell ring. We were running faster than usual. I reported to the company that the bell rang, but, as a matter of fact, it did not ring, as there was no bell to ring." The report of the accident made by this witness to the company was somewhat different from his testimony. It is shown that he left the employ of the company after the accident, and worked several days for the plaintiff. After the appellant rested his case, respondent's counsel moved for a judgment of nonsuit, on the grounds (1) that the evidence fails to show that the defendant's agents, in charge of the car, were guilty of negligence which was the proximate cause of the injury; (2) that plaintiff was guilty of contributory negligence which directly caused the injury for which he seeks to recover. The court granted the motion for a nonsuit, dismissed the cause, and rendered judgment against the plaintiff for costs. From this judgment and order, and from the order overruling the plaintiffs' motion for a new trial, this appeal was taken.

The respondent is a corporation, engaged in running and operating a line of electric street cars on several streets in Salt Lake City. Appellant contends that the evidence was sufficient to show negligence and want of ordinary care on the part of the respondent in running and operating the car, and that, at the time in question, the car was running at an unusually rapid rate of speed, which was not only

he looked in the direction from which the car came, and, in consequence of the trees and poles, saw none, and then approached the track. Before crossing it he made no particular effort to see whether a car was coming, and it was possible that the poles might have obstructed the view between him and the car. The car was running at the rate of 25 or 30 miles an hour, and no gong was sounded until just before the collision occurred in which plaintiff was injured. *Held*, that a nonsuit was improperly granted.

A street railway company has no superior right on a public street to that of the public at large, except the right to lay its track and operate its cars; and if it adopts a dangerous propelling power it must be held to a degree of care proportionate to the increase of danger to the public.

A street car has the right of way in case of meeting a person or vehicle, but each party, in order to avoid accident, must exercise ordinary care and such reasonable prudence as the surrounding circumstances require; and what may be considered ordinary care in one case may amount to culpable negligence in another. The existence of negligence in each case must depend on the circumstances peculiar to it.

It is the duty of a motorman to notice whether or not the track is clear when he approaches a public crossing, and to sound the gong as a warning.

The ordinance showing the rate of speed a car was allowed to run was competent evidence, and should have been admitted, unless it was invalid, and did not apply to the case.

While some courts hold that, where the speed is greater than that permitted by the ordinance, it is negligence *per se*, yet the better rule appears to be that it is a circumstance from which negligence may be inferred, and is always proper to be considered by the jury.

Persons traveling on a public street, along or across a street, are not held to the exercise of the same degree of care as when traveling along, or upon, or across an ordinary steam railroad.

When the injured party was negligent in the first instance, such negligence will not defeat his action, if it be shown that the defendant might have avoided the injury by the exercise of ordinary care and reasonable prudence.

As to whose negligence was the proximate cause of the accident is a question of fact for the jury.

Cases of this series cited in opinion, appearing in bold faced type: *Block v. Salt Lake Rapid Transit Co.*, vol. 4, p. 189; *Cincinnati St. Ry. Co. v. Whitcomb*, vol. 5, p. 602; *Houston City St. Ry. Co. v. Woodlock*, vol. 5, p. 580; *Riley v. Salt Lake Rapid Transit Co.*, vol. 5, p. 594; *Denver Tramway Co. v. Reid*, vol. 4, p. 432; *Little v. Superior Rapid Transit Co.*, vol. 5, p. 599; *Dederichs v. Salt Lake City Ry. Co.*, vol. 4, p. 592.

APPEAL by plaintiff from judgment of nonsuit rendered in District Court, Weber county.

how far the car was from the wagon when the gong was sounded. The plaintiff testified that he heard no gong, and had no knowledge of the car's approach until it struck him. The witness Anderson, who was in the best position to see, said the car was not more than from five to eight feet from plaintiff, and two other witnesses that it was not more than fifty or sixty feet from him when the gong sounded. The car at the time was running at the rate of twenty-five to thirty miles per hour, and, no brakes being set, or any effort made to stop, it struck with full force, demolishing the wagon and hayrack, killing one horse, and severely and permanently injuring the plaintiff. The wagon and team were dragged about fifty feet after being struck. The accident happened at the crossing on First street, which, however, is not a laid out street west of the avenue, but it is open, and the public cross through there, it being a short way to Harrisville avenue. The railway track, to the north of the place of the accident, is straight, with no obstruction to the view except the electric poles. The plaintiff knew that the cars were running regularly about every fifteen minutes. The accident happened on the 10th of October, 1893, at 5.30 P. M., it being a calm and clear day. Such is the testimony, in substance, disclosed by the record. The plaintiff also offered in evidence a city ordinance to show the rate of speed which was allowed on railroads in Ogden City; but this was rejected by the court on the ground that it was incompetent, irrelevant and immaterial. Counsel for the appellant insist that the court erred in rejecting the ordinance, and we are inclined to sustain their contention. It was admissible, unless for some special reason it was either invalid, or did not apply to this case. No such reason being shown, it ought to have been admitted.

The main question in this case arises on the action of the court in granting the nonsuit. Assuming the evidence to be true—which we must for the purpose of a nonsuit—

question whether or not the railway company was guilty of negligence. Busw. Pers. Inj. sec. 122; *Riley v. Salt Lake Rapid Transit Co.*, 10 Utah, 428; *Railway Co. v. Ives*, *supra*; *Gulf, C. & S. F. Railway Co. v. Breilling* (Tex. Sup.) 12 S. W. Rep. 1121; *Denver Tramway Co. v. Reid*, (Colo. App.), 35 Pac. Rep. 269. The conclusion is irresistible that on the question of negligence of the defendant there was ample evidence to be presented to the jury, but counsel for the respondent insist that the appellant was guilty of such contributory negligence as precludes his recovery. It is urged in support of this contention that, had the appellant looked to the north before going upon the track, he would have observed the car, and then could have stopped his horses until it had passed, and thus have avoided the injury; and that, having failed in this, he was the author of his own misfortune. It is not clear from the evidence that if he had looked north immediately before going upon the track, he would have observed the car. In fact, it is shown that from his position, just before his horses stepped upon the track, the electric poles formed some obstruction to the view, and it cannot be presumed that he was reckless as to his own safety. It would be more reasonable to infer from the evidence in the record that he felt secure because of the observation he had made, when in a position where his view was unobstructed. He was lawfully upon the street, and had a right to cross the track, and, attempting to do so at a public crossing, after he had looked and seen no car, had a right to assume that the railway company would give proper warning of the approach of a car, and not run him down recklessly. Persons traveling on a public street, along or across a street railway track, are not held to the exercise of the same degree of care and precaution as they are when traveling along or upon or across an ordinary steam railroad; and this is so because the people have the right to travel on every portion of the highway, while they

track' and 'rolling stock,' at its true cash value," and was authorized to examine persons and papers. And by sec. 130, each member of the board was required to declare, as part of his oath of office, that he would "in no case assess any property at more or less than its true cash value."

This court, at the last term, in several cases, affirming judgments of the Supreme Court of Indiana, held that the statute of 1891 did not, in the case of a railroad partly in that State and partly in another, require that the value of the part in Indiana should be determined absolutely by dividing the whole value upon a mileage basis; but only that the total amount of stock and indebtedness should be taken into consideration in ascertaining the value; and that the statute was constitutional. *Pittsburg, &c. Railway v. Backus*, 154 U. S. 421, 430, 435, and 133 Indiana, 625; *Indianapolis & Vincennes Railroad v. Backus*, 154 U. S. 438, and 133 Indiana 609; *Cleveland, &c. Railway v. Backus*, 154 U. S. 439, and 133 Indiana, 513.

In those cases, the objections to the constitutionality of that statute were answered by this court, speaking by Mr. Justice BREWER, as follows:

"It is not to be assumed that a State contemplates the taxation of any property outside its territorial limits, or that its statutes are intended to operate otherwise than upon persons and property within the State. It is not necessary that every section of a tax act should in terms declare the scope of its territorial operation. Before any statute will be held to intend to reach outside property, the language expressing such intention must be clear." 154 U. S. 428.

"It is obvious that the intent of this act was simply to reach property of the railroad within the State." "No intent to the contrary can be deduced from the provision requiring the corporation to file a statement of its total stock and indebtedness; for that is one item of testimony

By sec. 1 of the statute of 1893, every telegraph company, whether incorporated under the laws of Indiana or of any other State, engaged in telegraph business in Indiana, was required to return annually to the auditor of the State a statement of its whole capital stock, the par value of its shares, their market value, or, if they had no market value, the actual value thereof; its principal place of business; its real estate, machinery and appliances, subject to local taxation in each county and township within the State; its real estate outside the State and not directly used in the conduct of its business, and the sums at which such real estate was assessed for local taxation; the mortgages upon the whole or any part of its property; the whole length of all its lines, the length of its lines outside the State of Indiana, and the length of its lines in each county and township within the State. By secs. 6, 7, the State board of tax commissioners, "after examining such statements, and after ascertaining the value of such properties therefrom, and from such other information as they may have or obtain," and requiring books and papers to be produced, and witnesses to be examined "in case they shall deem it necessary to enable them to ascertain the true cash value of such property were required to value and assess the property of each company by ascertaining the true cash value of its entire property, for that purpose taking the aggregate value of its shares, if they had a market value, or if they had none, the actual value thereof or of the capital of the company; then, for the purpose of ascertaining the true cash value of the property within the State (first ascertaining and deducting the assessed value for taxation, in the localities where the same was situated, of its real estate outside the State, and not specifically used in its general business), taking the proportion of the whole aggregate value of its property, as above ascertained, which the length of its lines within the State bore to the total length of its lines; and deduct-

any other case, it is shown to the board, or is discovered by them, that still further deductions should be made, on account of larger proportional values outside of the State, or for any other reason, then the board must make such deductions, so that, finally, only the property within the State of Indiana shall be assessed, and that at its true cash value." 141 Indiana, 297.

The State court distinctly held that the statute of 1893, being supplementary to and amendatory of the statute of 1891, must be construed in connection therewith, and be treated as a part of one and the same general tax act; that the duties and powers of the State board of tax commissioners, as defined and prescribed in the statute of 1891, were not abridged or changed in any respect by the statute of 1893; and, therefore, interpreting the statute of 1893 in the light of the provisions of the statute of 1891 (which have been cited above), concluded "that in the act of 1893 the Legislature provided the mileage method as the basis for the assessment of telegraph and other like property, both as to lines situated partly within and partly without this State, and also as to lines running through several counties or other subdivisions of the State; but that it was not the intention of the Legislature, nor is it the meaning of that act, that any property outside of the State should be assessed by importation of values or otherwise, or that any property should be assessed at more or less than its true cash value. Construing the acts of 1891 and 1893 together, it will therefore be presumed, in the absence of evidence to the contrary, that the State board has deducted from the total valuation of all interstate property such values, if any, of extra-state property as will leave the remaining property, within and without the State, as near as may be, of equal proportional value." "The act of 1893 provides, generally, for a mode of ascertaining the true cash value of that part of interstate telegraph and other property which is within the

different point with the central office; that the word "line," as used in the telephone business, has in such business a clearly defined, well known, established and definite meaning, viz., a line of poles and the wires suspended thereon, without regard to the number of those wires; that the plaintiff's plant in Pensacola embraces only 23 miles of line as thus defined, although the length of the wire used thereon is much greater, viz., about 70 miles; that defendant was then and for several years past had been the collector of revenue for said county, and *ex officio* collector of revenue for said provisional municipality, duly elected, qualified, and authorized to act as such officer; that on October 1, 1891, plaintiff endeavored to procure and duly applied for a license from the State, county and municipality of Pensacola to operate the said telephone plant, and having a line of less than 25 miles in length, and tendered to defendant as collector, the amount of the license taxes and fees therefor, as fixed by the State, county and municipality, respectively, viz., the sum of \$50.50, and demanded that the licenses be issued to it; that defendant refused to accept the sum tendered, or to issue the licenses, demanding of plaintiff that it procure licenses for the operation of a telephone line of more than 25 miles in length and upon its refusal to do so the defendant procured the plaintiff's local manager and agent to be repeatedly arrested upon the criminal charge of doing business in operating a telephone line without a license therefor, instituting a new prosecution upon such criminal charge each day, and furthermore levied upon the apparatus and property of plaintiff, of great value, which property was indispensable to plaintiff in the operation of its plant and business, and was proceeding to sell the same for the payment of the license tax for doing business with a telephone line of more than 25 miles in length, when the plaintiff, in order to save its agent from further prosecution, and prevent

plying perhaps a tenth as many subscribers, is required to pay a license tax of \$100. The Legislature could have intended no such result. A line, though supported by posts supporting other lines, is none the less a line. If the length of two lines running parallel within a few feet of each other, supported by separate posts, supplying separate customers on the same street, is to be added in estimating the length of telephone lines, as is not denied by the plaintiff, we are unable to see why a different rule should prevail where the same conditions exist except that the same posts are used to support both lines. By giving to the statute the construction we adopt, we are carrying out the intention of the Legislature to reduce the license tax to be paid by companies deriving small profit from their investment, while, by adopting the construction contended for by plaintiff, this intention would not only be disregarded, but entirely frustrated. While it is true, as a general rule, that popular words are to be construed in the popular sense, and technical words in a technical sense, when used in a statute, yet, when a word has both a popular and a technical meaning, the court will give it effect according to the popular signification, if it was so used by the Legislature, and the context may be referred to in ascertaining the sense in which it was used. *Green v. Weller*, 32 Miss. 650; *Cummings v. Coleman*, 7 Rich Eq. 509; *People v. Tighe*, 5 Hun, 25; *State v. Barnes*, 24 Fla. 153.

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apparatus or engines shall be actually employed and used in the business of manufacturing in said city, etc.

On February 4, 1891, they passed an ordinance providing:

That the machinery and manufacturing apparatus of all manufacturing industries established within the corporate limits of Frederick within two years next succeeding the date of the passage of this ordinance and actually employed or used in the business of manufacturing in Frederick City shall be exempt from taxation for five years.

The bill alleges that the appellant located its manufacturing plant in Frederick City within the prescribed time, and has since then been engaged in the manufacture of electricity. The appellees filed an answer in which they allege that the plant of the appellant is not included in the exemption, as it is not comprehended within the term "manufacturing industries." The controversy, therefore, raised by the pleadings, is whether an electric light company is a manufacturing industry, within the meaning of that ordinance. In determining this question, we do not deem it necessary to attempt a scientific discussion of what electricity is. Nor do we think we can gather much assistance from encyclopedias, dictionaries or other books endeavoring to define it. Whether an electric light company can properly be said to "manufacture" electricity, or whether it simply brings into action that which is already made, we need not determine. The mayor and aldermen of Frederick have, by virtue of a supposed authority granted them by the Legislature, undertaken to exempt certain property from municipal taxation, and we are simply to determine whether the appellant can reasonably be said to be within the meaning and intention of this legislation. In doing that, we should not be too technical, or wholly governed by the strict definition of words used by the Legislature; but we must ascertain the purpose of the law,

Of every municipal corporation the charter or statute by which it is created is its organic act. Neither the corporation nor its officers can do any act, or make any contract, or incur any liability, not authorized thereby, or by some legislative act applicable thereto. All acts beyond the scope of the powers granted are void. Much less can any power be exercised, or any act done, which is forbidden by charter or statute." The same author says (section 91) that "the rule of strict construction of corporate powers is not so directly applicable to the ordinary clauses in the charters or incorporating acts of municipalities as it is to the charters of private corporations; but it is equally applicable to grants of powers to municipalities and public bodies which are out of the usual range, or which may result in public burdens, or which, in their exercise, touch the right to liberty or property, or, as it may be compendiously expressed, any common law right of the citizen or inhabitant." While a strict construction should be applied to the grant of power, yet, if a power is necessarily or fairly implied in, or incident to, those clearly given, it is not to be impaired by a strict construction. *Kyle v. Halin*, 8 Ind. 34. In speaking of the powers of municipal corporations, it is said in *City of Bridgeport v. Housatonic R. R. Co.*, 15 Conn. 495; "They may exercise all the powers within the fair intent and purpose of their creation which are reasonably proper to give effect to power expressly granted. In doing this they must (unless restricted in this respect) have a choice of means adapted to ends, and are not to be confined to any one mode of operation." In construing a charter giving to a city the right to pass ordinances for the prevention and suppression of fires, and to appoint and remove fire wardens, and to prescribe the powers and duties of such fire wardens, and of fire engineers and firemen, and to raise money to support the fire department, it was held that, although no express grant of power was conferred to

CENTRAL UNION TELEPHONE COMPANY v. BENJAMIN
SWOVELAND.

Indiana Appellate Court, February 12, 1896.

(14 Ind. App. 341.)

TELEPHONE COMPANIES—GENERAL DUTIES—DUTY TO FURNISH MESSENGERS
FROM TOLL SERVICE STATIONS—RULES AND REGULATIONS—DAMAGES.

A telephone company, like a telegraph company, is a *quasi* common carrier; it is a public servant, and bound to serve the public with impartiality, good faith and diligence. This is so especially by statute in Indiana.

While such a company has a right to make reasonable regulations, they must not have the effect of relieving the company of the duties and obligations which it owes its patrons by means of its public character. It is part of the duty of a telephone company, in relation to its toll service business, to notify the party with whom a telephone interview is sought, provided he be within a reasonable distance, that he is wanted at the instrument at the terminal station, and to do so within a reasonable time.

A regulation, publicly displayed at the stations of a telephone company, that it will not undertake to deliver messages, and that any person who assists in conversation does so as the agent of the patron and not of the company, does not excuse the company's failure to give such notification.

The interview sought being with a veterinary surgeon, for the purpose of summoning him to attend a sick horse, *held*, that under the evidence damages for the loss of the horse were too remote and conjectural to be allowed against the company.

Cases of this series cited in that portion of the opinion which is reported in full, appearing in bold faced type: *State, Trenton, &c. Co. et al. Pros. v. Am. & Eur. Com. News Co.*, vol. 1, p. 343; *Hockett v. State of Indiana*, vol. 2, p. 1.

APPEAL by defendant below from judgment of Circuit Court, Blackford county. Facts stated in opinion.

Bayless, Guenther & Clark, for appellant.

Cantwell, Cantwell & Simmons, for appellee.

while the company desires to afford every practicable accommodation to the public, the use of its lines is authorized only for patrons personally, the principals to a communication being present at the telephone. The company does not undertake to transmit and deliver messages, and will not be responsible for such business. Any person who assists conversations does so as the agent or employe of the patron, and not of the telephone company. No refund will be allowed unless claimed within twenty-four hours after an unsatisfactory service. The company's advertised rate for toll service covers in each case but one connection and retention of the line, not to exceed five minutes. An additional charge at the same rate will be made for each successive period of five minutes or fractional part thereof. F. G. Beach, Gen'l Supt., Chicago, December 1, 1888.

Defendant further says that its said agent at the town of Montpelier, in communicating the plaintiff's message to the said agent at Hartford City, was not the agent of this defendant, but was for that purpose the agent of plaintiff; and that its agent at Hartford City, in receiving said message, did so solely as the agent of the plaintiff, and was not in that matter the agent of this defendant.

"Defendant further says that, in delivering messages received over its wires and by its telephone instrument, the same is taken by the messenger as the agent of the patron, the person sending the same, under such arrangement as may be effected between such persons, and not as the agent of the defendant; that the said agent at Hartford City, in undertaking or agreeing to deliver the plaintiff's message to said veterinary surgeon, did so under a contract between the plaintiff and the said agent at Hartford City, for a compensation of twenty-five cents; that the defendant, under its rules and regulations, received no part or parcel of the fee in compensation paid for the delivery of message from its offices, and had no interest whatever therein, but that said fee and consideration belongs wholly to the person whom the patrons or plaintiff may employ for such service.

"Defendant further says that the acts of negligence charged in the plaintiff's complaint, and in each paragraph thereof, were solely the negligence, and default, if there

enforce such a regulation, and that the same is reasonable, and not against public policy, we do not think the complaint proceeds upon the theory that the appellant failed to deliver a message, but on the theory that appellant failed to notify Dr. Rhine, at Hartford City, that his presence was desired at the telephone.

There are two kinds of telephone service which the appellant has undertaken to perform for the public. One is accomplished by means of instruments placed in the residences or places of business of the patrons for their private and personal enjoyment and benefit, and it needs no agent or messenger to carry such service into execution except the operator of the central office. These instruments are furnished by the company in consideration of a fixed periodical rental, paid by the patron. The other is what is denominated toll service, and is rendered by placing at the disposal of the patron at the transmitting station, and the one at the receiving station, instruments connected by electric wires, by means of which the two are enabled to carry on a conversation. To render the latter service effective, it is necessary, of course, that there should be some one at the receiving station ready to notify the person with whom it is desired by the patron at the transmitting station to converse, unless such person should himself be in possession of a telephone instrument at his residence or place of business which is connected with the main line. The person who is usually sent to look up the party wanted at the instrument is called a messenger, and is generally, if not universally, supplied by the telephone company; for, if the patron who desires to be placed in communication with the party at the receiving station were himself required to send out and have such party brought to the station and to the instrument, the service would be practically worthless to him. Hence, we take it that it was a part of the duty of the appellant, if Dr. Rhine resided within a reasonable distance

MONKS, C. J.: This action was brought by appellee against appellant to recover the statutory penalty under sections 5529, Rev. St. 1894 (section 2, p. 151, Acts 1885), for failure and refusal on the part of appellant to supply appellee with "telephone connection and facilities without discrimination or partiality." The complaint was in two paragraphs, which were substantially the same except the offense was alleged on different days. Appellant's separate demurrer for want of facts to each paragraph of complaint was overruled. An answer in three paragraphs was filed, to which a reply of general denial was filed. The cause was tried by jury, and a general verdict rendered in favor of appellee, and his damages assessed at \$100; and, over a motion for a venire *de novo* and a motion for a new trial, judgment was rendered in favor of appellee.

The first objection urged to the complaint is that the act upon which the cause of action is based embraces more than one subject—telegraph companies and telephone companies—and is, therefore, unconstitutional, under the provisions of section 19 of article 4 of the Constitution. Rev. St. 1881, sec. 115 (Rev. St. 1894, sec. 115). The act in question is entitled "An act to prescribe certain duties of telegraph and telephone companies, providing penalties therefor, and providing an emergency." Acts 1885, p. 151, sec. 2 (Rev. St. 1894, sec. 5529). This court has held that a telephone company doing a general telephone business is a common carrier of news in the sense a telegraph company is a common carrier; and that section 2, p. 151, Acts 1885 (section 5529, Rev. St. 1894), prescribes the duties of telegraph and telephone companies as such common carriers. *Central Union Telephone Co. v. Bradbury*, 106 Ind. 1, and cases cited; *Central Union Telephone Co. v. State, ex rel. Falley*, 118 Ind. 194, 206. The subject of the act is neither telegraph nor telephone companies, but is prescribing the duties of such

tions and facilities, without discrimination or partiality. . . .” Merely furnishing an applicant with an instrument, and connecting the same with the exchange, is not a compliance with this statute. This alone would not enable such person to use the telephone instrument. After the telephone instrument was furnished appellee, and connected with the exchange, it was the duty of appellant each time, when requested by appellee, to make such connection as would enable him to converse with the person named, without discrimination or partiality; and, for a refusal so to do, appellant became liable to appellee, as provided in said act. The court did not err, therefore, in overruling the demurrer to each paragraph of the complaint.

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NOTE.—The prohibition against discrimination by telephone companies incident to their position as common carriers of intelligence, which was under consideration in the two preceding cases, was also discussed in several earlier cases in this series, which may be referred to in the several indexes, under title, “*Discrimination.*”

UNITED STATES V. UNION PACIFIC RAILWAY COMPANY AND WESTERN UNION TELEGRAPH COMPANY.

United States Supreme Court, November 18, 1895.

(160 U. S. 1.)

TELEGRAPH ON RAILROAD RIGHT OF WAY — POST-ROADS ACT — DISCRIMINATION — STATUTES CONSTRUED.

The intention of Congress in enacting the statutes of July 1, 1862 (c. 120, 12 Stat. 489), and July 2, 1864 (c. 216, 13 Stat. 356), was to provide for the maintenance of both a railroad and a telegraph line from the Missouri river to the Pacific ocean, and governmental aid was extended by said statutes in order to accomplish both those results; and the

interchange of telegraph business between said companies; and such railroad and telegraph companies, referred to in the first section of this act, shall so operate their respective telegraph lines as to afford equal facilities to all without discrimination in favor of or against any person, company or corporation whatever, and shall receive, deliver and exchange business with connecting telegraph lines on equal terms, and affording equal facilities and without discrimination for or against any one of such connecting lines; and such exchange of business shall be on terms just and equitable."

If any railroad or telegraph company referred to in the first section, or any company operating such railroad or telegraph line, refuses or fails, in whole or in part, to maintain and operate a telegraph line as provided in the act of 1888 and the acts to which it is supplementary, "for the use of the government or the public, for commercial and other purposes, without discrimination," or refuses or fails to make or continue such arrangements for the interchange of business with any connecting telegraph company, then, by the third section, application for relief may be made to the Interstate Commerce Commission, whose duty it shall be to ascertain the facts, and prescribe such arrangement as will be proper in the particular case.

The fourth section is in these words: "In order to secure and preserve to the United States the full value and benefit of its liens upon all the telegraph lines required to be constructed by and lawfully belonging to said railroad and telegraph companies referred to in the first section of this act, and to have the same possessed, used, and operated in conformity with the provisions of this act and of the several acts to which this act is supplementary, it is hereby made the duty of the Attorney-General of the United States, by proper proceedings, to prevent any unlawful interference with the rights and equities of the United States under this act, and under the acts herein-

authority of the above acts of Congress of July 1, 1862, c. 120, 12 Stat. 489, and July 2, 1864, 13 Stat. c. 216, 356) of the following companies: The Union Pacific Railroad Company, incorporated by the act of July 1, 1862, the Kansas Pacific Railway Company, formerly known as the Union Pacific Railway Company, Eastern Division, which latter company succeeded to the rights and powers of the Leavenworth, Pawnee and Western Railroad Company, a Kansas corporation that accepted the aid provided by the act of July 1, 1862, and the Denver Pacific Railway and Telegraph Company, a corporation of Colorado.

The present suit proceeds on the ground that the Union Pacific Railway Company is conducting its business under certain contracts and agreements with the Western Union Telegraph Company that are not only repugnant to the provisions of the above act of 1888, but are inconsistent with the rights of the United States, and in violation of the obligations imposed upon the railway company by other acts of Congress. The relief asked was a decree annulling those contracts and agreements and compelling the railway company to maintain and operate telegraph lines on its roadways, as required by the act of 1888.

By the final decree of the Circuit Court it was adjudged, among other things, that the following agreements be annulled and held for naught:

An agreement of October 1, 1866, between the Union Pacific Railway Company, Eastern Division, and the Western Union Telegraph Company;

Two agreements, one of September 1, 1869, and one of December 14, 1871, between the Union Pacific Railroad Company and the Atlantic and Pacific Telegraph Company, the rights of the latter company having been acquired, as is claimed, by the Western Union Telegraph Company; and,

An agreement of July 1, 1881, between the Union

San Francisco or the navigable waters of the Sacramento river, to the eastern boundary of that State, "upon the same terms and conditions, in all respects, as are contained in this act for the construction of said railroad and telegraph line first mentioned, and to meet and connect with the first mentioned railroad and telegraph line on the eastern boundary of California."

The tenth section authorized the Kansas and California companies, or either of them, after completing their roads, to unite upon equal terms with the first named company in constructing so much of said "railroad and telegraph line and branch railroads and telegraph lines," in the act mentioned, through the Territories from the State of California to the Missouri river, as shall then remain to be constructed, on the same terms and conditions as provided in relation to the said Union Pacific Railroad Company. And the Hannibal and St. Joseph Railroad, the Pacific Railroad Company of Missouri, and the first named company or either of them, on filing their assent to the act, were authorized to unite upon equal terms, with the said Kansas Company, in constructing said railroad and telegraph, to said meridian of longitude, with the consent of the said State of Kansas; "and in case said first named company shall complete its line to the eastern boundary of California before it is completed across said State by the Central Pacific Railroad Company of California, said first named company is hereby authorized to continue in constructing the same through California, with the consent of said State, upon the terms mentioned in this act, until said roads shall meet and connect, and the whole line of said railroad and telegraph is completed; and the Central Pacific Railroad Company of California, after completing its road across said State, is authorized to continue the construction of said railroad and telegraph through the Territories of the United States to the Missouri river, including the branch roads specified in

or out of repair, and unfit for use, Congress may pass any act to insure the speedy completion of said road and branches, or put the same in repair and use, and may direct the income of said railroad and telegraph line to be thereafter devoted to the use of the United States, to repay all such expenditures caused by the default and neglect of such company or companies."

The eighteenth section provided that whenever it appeared that "the net earnings of the entire railroad and telegraph," including the amount allowed for services rendered for the United States, after deducting all expenditures, including repairs, and the furnishing, running and managing of said road, shall exceed ten per centum upon its cost, exclusive of the five per centum to the United States, Congress could reduce the rates of fare thereon, if unreasonable in amount, and fix and establish the same by law. And "the better to accomplish the object of this act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the government at all times (but particularly in time of war) the use and benefits of the same for postal, military and other purposes, Congress may, at any time, having due regard for the rights of the said companies named herein, add to, alter, amend or repeal this act."

The act of July 1, 1862, was amended, in various particulars, by the act of July 2, 1864, c. 216. 13 Stat. 356. By the tenth section of the latter act the former was so amended that the Union Pacific Railroad Company, the Central Pacific Railroad Company and other companies authorized to participate in the construction of the proposed lines of road, could "issue their first mortgage bonds on their respective railroad and telegraph lines to an amount not exceeding the amount of the bonds of the United States," and "the lien of the United States shall be subordinate to that of the bonds of any or either

subordinate to it. Sec. 10. It did more. It required those companies to operate and use their roads *and telegraph* for all purposes of communication, travel and transportation, so far as the public and government were concerned, "as one connected, continuous line," and without discrimination against either road—a requirement that would not have been made if Congress had not intended that each company receiving aid from the government should itself maintain and operate or control, or should provide for the maintenance, on its own route, and under its own control, of a telegraph line for the accommodation of both the government and the general public.

What we have said as to the objects that Congress intended to accomplish by aiding the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean is based upon sections one to eighteen, inclusive, of the act of July 1, 1862, and upon the provisions of the amendatory acts of July 2, 1864, c. 216, and June 20, 1874, 18 Stat. 111, c. 331. If we look alone to those sections and provisions, the conclusion must be that any company named in the act of 1862, and receiving the aid therein granted by the government, was required itself, and through its own officers and employes, to construct, maintain and operate both a railroad and telegraph line, and could not assign or transfer to any other corporation its franchises in that regard.

But there is a section in the act of 1862 showing that, for the benefit of certain telegraph companies that had already expended large sums in the construction of telegraph lines, Congress was willing, in a named contingency, to relieve the railroad companies receiving governmental aid, from at least, any present obligation to construct telegraph lines on their respective rights of way. That contingency is indicated in the nineteenth section of the act of 1862, which provides:

that after that date and until 1880, the line of telegraph extending from Kansas City to Denver was operated under the contract of October 1, 1866. It is further claimed that the telegraph line so constructed was accepted by the government as a substitute for the line which the charter of the railroad company required it to construct, maintain and operate.

If it were true that the telegraph line on the Kansas Pacific branch was constructed on the roadway of the railroad company under such an "arrangement" with the railroad company as was contemplated or permitted by the fourth section of the Idaho act, and that the government, by not declaring to the contrary, is to be deemed to have accepted the construction by the telegraph companies of a line on the south side of the right of way of the Union Pacific Railroad as equivalent to an "arrangement" allowed by the nineteenth section of the act of 1862, the question would remain whether such arrangements, even if legal in all respects when made, so tied the hands of the government that it could not, at a subsequent date, in execution of the purposes of Congress, require the railroad company, by its own officers and employes exclusively, to maintain or operate telegraph lines for railroad, governmental and commercial purposes, on and over its roads, for the construction of which the aid of the United States was accepted.

We have seen that the object of giving governmental aid to the corporations named in the act of 1862 was to promote the public interest and welfare by the construction and operation of a railroad and telegraph line, to the use and benefit of which the government should be entitled at all times, particularly in time of war, for postal, military and other purposes; and that "the better to accomplish" that object Congress reserved the power, capable of being exercised at any time, of *adding to*, *altering*, *amending* or *repealing* such act, having "due regard

to the rights" of the companies named in it; and that by the act of 1864, c. 216, the several companies authorized to construct the roads named were required to operate and use their roads and telegraph for all purposes of communication, travel and transportation, as one connected, continuous line, affording equal advantages and facilities as to rates, time and transportation, without discrimination against other companies, or against persons requiring the transmission of news and messages.

No express limitation is imposed upon the exercise of the power so reserved, except that the act of 1862 required that due regard be had to the rights of the railroad companies that accepted its provisions. But, looking at the entire act, it is clear that there was no purpose to interfere with the authority of Congress to enact such laws, by way of addition to or alteration of existing legislation, as were necessary or conducive to the attainment of the public objects sought to be attained. Indeed, the words in the act of 1862, "due regard for the rights of said companies named therein," suggest only such restrictions as the law, without such words, would imply.

It would not be competent for Congress, under the guise of altering and amending the act in question, to impose upon the railroad company duties wholly foreign to the objects for which it was created or for which governmental aid was given. Neither could it, by such alteration or amendment, destroy rights actually vested, nor disturb transactions fully consummated. We may here, not inappropriately, repeat what was said in the *Sinking Fund Cases*, 99 U. S. 700, 718, 719, 720, that "this power has a limit," and "cannot be used to take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits actually reduced to possession of contracts lawfully made." Again in the same case: "The United States cannot, any more than a State, interfere with private rights, except for legitimate

governmental purposes. They are not included within the constitutional prohibition which prevents States from passing laws impairing the obligation of contracts, but equally with the States they are prohibited from depriving persons or corporations of property without due process of law. They cannot legislate back to themselves, without making compensation, the lands they have given this corporation to aid in the construction of its railroad. Neither can they by legislation compel the corporation to discharge its obligations in respect to the subsidy bonds otherwise than according to the terms of the contract already made in that connection. The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen. No change can be made in the title created by the grant of the lands, or on the contract for the subsidy bonds, without the consent of the corporation. All this is indisputable."

But it cannot be doubted that the act of 1888 is within the general scope, and consistent with the objects, of the previous statutes relating to railroad and telegraphic communication between the Missouri river and the Pacific ocean. If Congress concluded—and we must assume, from the provisions of the act of 1862, that it did conclude—that the public interests and the general welfare would be promoted if the railroad company, accepting national aid, should exercise through its own officers and employees exclusively, the telegraphic franchises granted to it, it is difficult to perceive how legislation designed to enforce such a policy can be held to be wanting in due regard to the rights of such company.

It may be that Congress passed the act of 1888 because, in its judgment, the rights of the government and of the public, in the matter of telegraphic communication, could

national Legislature must keep, and beyond which it may not pass, when exerting its reserved power of adding to, altering or amending statutes and charters of incorporation.

We have, therefore, considered the question before us just as if a contract or arrangement, between the railroad and telegraph company, for the construction by the latter of a telegraph line on the route of the former, expressly recited the provision of the act of 1862, by which Congress reserved the power, to be exerted at any time, to add to, amend or repeal the act which authorized such contract or arrangement.

In this view, it must be held that by its reservation of authority to add to, alter, amend or repeal the acts in question, whenever it chose so to do, Congress, subject to the limitation that rights actually vested or transactions fully consummated could not be disturbed, intended to keep within its control the entire subject of railroad and telegraphic communication between the Missouri river and the Pacific ocean, through the agency of corporations created by it, or that had accepted the bounty of the government. It was never intended that the railroad companies, accepting such bounty, should be able, by any contract or arrangement with telegraph companies, to discharge themselves, for all time and beyond the authority of Congress otherwise to provide, from the obligation to exercise, by their officers and agents exclusively, the telegraphic franchises received by them from the National Government.

These principles are fully supported by former decisions, in which this court has determined the scope and effect of constitutional or statutory provisions that reserved to the Legislature granting charters of incorporation, or enacting statutes under which private rights might be acquired, the power to alter, amend or repeal such charters or statutes.

the agreement was to grant to the Western Union Telegraph Company, as against all other telegraph companies, the exclusive right to control the railway company's roadway for telegraphic purposes, so far as that could be done without interfering with the ordinary operations of the railway company.

This agreement of October 1, 1866, enabling the Western Union Telegraph Company to exclude all other telegraph corporations from the roadway of the railway company, if not void as against public policy, independently of specific statutory provisions, was inconsistent with the act of Congress of July 24, 1866, 14 Stat. 221, c. 230, entitled "An act to aid in the construction of telegraph lines, and to secure to the government the use of the same for postal, military and other purposes." The substantial provisions of this statute have been preserved in sections 5263 to 5268, inclusive, of the Revised Statutes.

By the act of June 8, 1872, 17 Stat. c. 335, pp. 308, 309, reproduced in section 3964 of the Revised Statutes, all the waters of the United States, during the time the mail is carried thereon, and all railroads or parts of railroads in operation, are post roads. And by the above statute of 1866 Congress declared that any telegraph company then organized, or which might thereafter be organized, under the laws of any State of the Union, should have the right to construct, maintain and operate lines of telegraph through or over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which had been or might thereafter be declared such by act of Congress, and over, under or across the navigable streams of the United States; the lines of telegraph to be so constructed and maintained as not to obstruct the navigation of streams and waters, or interfere with the ordinary travel on military or post roads. "And any of said companies," the act declared, "shall have the right to take and use from such public lands the necessary

one telegraph company a monopoly of the use of its roadway for telegraphic purposes. In none of the acts of Congress, having for their object the establishing of communication by railroad and telegraph between the Missouri river and the Pacific Ocean, is there to be found anything indicating a purpose to allow the post-roads of the United States, particularly those aided by the government, to fall, for all the purposes of telegraphic communication, under the exclusive control of one or more telegraph corporations. On the contrary, as early as the act of June 16, 1860, c. 137, "to facilitate communication between the Atlantic and Pacific States by electric telegraph," it was declared that nothing in that act contained should confer "any exclusive right to construct a telegraph to the Pacific, or debar the government of the United States from granting from time to time similar franchises and privileges to other parties." 2 Stat. 41.

If, however, it be contended that this is not the correct interpretation of the Idaho act, upon what ground can it be claimed that any arrangement could be made under the Idaho act, after the passage of the act of July 24, 1866, that was inconsistent with the latter act? Can it be said that, after the passage of the act of 1866, and while it was in force, a railway company, operating a post-road of the United States, could, by any form of agreement, exclude from its roadway a telegraph company which had accepted the provisions of that act? These questions can be answered only in one way, namely, that every railroad operating a post-road of the United States, over which commerce among the States is carried on, was inhibited, after the act of July 24, 1866, took effect, from making any agreement inconsistent with its provisions or that tended to defeat its operation. The object of that act was not only to promote and secure the interests of the government, but to obtain, for the benefit of the people of the entire country, every advantage, in the matter of com-

munication by telegraph, which might come from competition between corporations of different States. It was very far from the intention of Congress, by any legislation, to so exert its power as to enable one telegraph corporation, Federal or State, to acquire exclusive rights over any post-road, especially one for the construction of which the aid of the United States had been given, and the use of which was, to some extent, under the control of the National Government.

We are, consequently, of the opinion that the agreement of October 1, 1866, was, in its essential provisions, invalid and not binding upon the railway company.

In reference to the agreements of 1869 and 1871 between the Union Pacific Railroad Company and the Atlantic and Pacific Telegraph Company, but little need be said to show that they were void. By those agreements the former corporation demised and leased to the telegraph company, to whose rights, it may be assumed, the Western Union Telegraph Company succeeded, all the telegraph lines, wires, poles, instruments, offices and other property appertaining to telegraph business, that were possessed by the railroad company. These agreements were annulled by the Circuit Court, and it was likewise so adjudged by the Circuit Court of Appeals. The same conclusion had been previously announced by Judge McCrARY in *Atlantic & Pacific Telegraph Co. v. Union Pacific Railway Co.*, 1 McCrary, 541, 547. That able judge well said: "I conclude that the charter of the Union Pacific Railroad Company devolved upon it the duty of constructing, operating and maintaining a line of telegraph for commercial and other purposes and that this is in its nature a public duty. I am further of the opinion that, by the provisions of the contract of September 1, 1869, and of December 20, 1871, the railroad company undertook to lease or alienate property which was necessary to the performance of this duty. The consideration for these contracts is declared to be 'the

judgment in mandamus, as between the United States and the railway company, would conclude the rights of the telegraph company. The United States is certainly entitled to the interposition of equity for the cancellation of the agreements under which the telegraph company asserts rights inconsistent with the act of 1862 and the acts amendatory thereof, as well as with the act of 1888. Jurisdiction in equity being acquired for that purpose, the court, in order to avoid a multiplicity of suits, can proceed to a decree that will settle all matters in dispute between the United States, the railway company and the telegraph company, which relate to the general subject of telegraphic communication between the points named by Congress. Consequently a decree cancelling the agreements of 1866, 1869, 1871 and 1881, by reason of their being in the way of the full performance by the railway company of the duties imposed by the act of 1888, may also require the railway company to obey the directions of Congress as given in the last named act.

Indeed, in a proceeding by mandamus instituted against the railway company alone, it might be objected that a court of competent jurisdiction, in a suit brought by the telegraph company against the railroad company, had enjoined the latter as between it and the telegraph company, from disregarding the agreement of 1881. *Atlantic & Pacific Tel. Co. v. Union Pacific Railway*, 1 McCrary, 541; *Western Union Telegraph Co. v. Union Pacific Railway*, 3 Fed. Rep. 423; *Same v. Same*, 3 Fed. Rep. 721. It is true that the United States, with leave of court, might have intervened in that suit. But it was not bound to do so. It was entitled to institute its own suit, and bring before the court both companies, to the end that its rights might be declared and enforced by a comprehensive decree against both defendants.

In *Boyce v. Grundy*, 3 Pet. 210, 215, this court said: "It
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was applied in *Peck v. School Dist. &c.*, 21 Wisconsin, 516, 523. That was a suit to set aside a contract made by the officers of a municipality. The court held that the contract should be set aside, and the question arose whether the decree might not go farther and prevent the collection of the taxes assessed and levied for the purposes of the contract adjudged to be illegal. It was held that as the taxes were levied in order to carry the illegal contract into effect, their collection could be stayed as a proper subsidiary ground of relief, upon the principle that the jurisdiction of the court having once rightfully attached, it should be made effectual for all the purposes of complete relief. "The court," it was said, "will not annul the contract, and at the same time permit the officers of the district to collect the taxes to be afterwards recovered back by a multiplicity of suits at law."

We are of opinion that the Circuit Court properly adjudged that equity had jurisdiction to give full relief in respect of all matters in issue between the United States and the defendant companies.

We perceive no substantial error in the decree passed by the Circuit Court. There are some minor provisions in each of the contracts annulled by it which may not be regarded as in themselves beyond the power of the contracting parties, nor inconsistent either with the duties enjoined upon the railway company by the act of 1888 or with the rights of the United States. But they are of so little practical importance, and are so interwoven with, and so difficult to be separated from, the provisions found to be illegal and to stand in the way of the due execution of the act of Congress, that the Circuit Court properly adjudged that the contracts referred to should be set aside and annulled.

The decree of the Circuit Court of Appeals of January 29, 1894, is reversed and set aside, and the decree of the Circuit Court of October 11, 1892, is affirmed.

It is further adjudged by this court that the Circuit Court make a supplemental decree, enlarging the period within which the defendants may make such arrangements, adjustments, and changes as shall become necessary by reason of the annulling of the contracts of October 1, 1866, September 1, 1869, December 14, 1871, and July 1, 1881, and to carry out the provisions of the final decree of that court. Reversed.

Mr. Justice BREWER took no part in the hearing or decision of this case on the present appeal.

WESTERN UNION TELEGRAPH COMPANY V. NANCY BRYANT.

Indiana Appellate Court, Feb. 17, 1897.

FAILURE TO DELIVER TELEGRAM—NOTICE OF IMPORTANCE—MENTAL DISTRESS.

Mental distress alone warrant recovery of damages from a telegraph company for failure to deliver a message.

Telegram in words: "Cannot come to-day. Will come to-morrow," does not sufficiently apprise the telegraph company to which it is presented for transmission that mental distress will be the probable result of failure to deliver.

Physical discomfort of a woman in walking four blocks and carrying heavy bundles does not warrant recovery against telegraph company whose negligent failure to deliver a telegram caused her such exertion.

Complaint held sufficient to permit recovery of actual damages.

Cases of this series cited in opinion, appearing in bold faced type: *Reese v. W. U. Tel. Co.*, vol. 3, p. 640; *McAllen v. W. U. Tel. Co.*, vol. 2, p. 788.

APPEAL by defendant from judgment of Circuit Court, Monroe county. Facts stated in opinion.

Loudon & Loudon, for appellant.

East & Miller and *James E. Steele*, for appellee.

COMSTOCK, C. J.: The appellee sought to recover

Under this latter rule, speculative, contingent and remote damages, which cannot be directly traced to the breach complained of, are excluded. . . . The damages must be such as the parties may fairly be supposed to have contemplated when they made the contract." *Leonard v. N. Y., Albany & Buffalo Electro-Magnetic Tel. Co.*, 41 N. Y. 544.

In *Baldwin v. United States Tel. Co.*, 45 N. Y. 744, speaking for the court, ALLEN, J., says: "Whenever special or extraordinary damages, such as would not naturally or ordinarily follow a breach, have been awarded for non-performance of contracts, whether for the sale or carriage of goods, or for the delivery of messages by telegraph, it has been for the reason that the contracts have been made with reference to peculiar circumstances known to both, and the particular loss has been in the contemplation of both, at the time of making the contract, as a contingency that might follow the non-performance. . . . When a special purpose is intended by one party, but is not known to the other, such special purpose will not be taken into account in the assessment of damages for the breach."

Thompson, *Electricity*, sec. 313, says: "A negative brief statement of this rule is that there can be no recovery for a loss arising from specific circumstances not communicated to the company at the time when the dispatch is delivered to it for transmission, or before it has assumed the undertaking, or before the time has elapsed within which it has become impossible for it to perform it so as to avoid loss."

There is a conflict in the decisions of the courts of the different States as to whether damages may be recovered for mental distress alone, when not connected with physical injury or pecuniary loss. It is the law in this State, however, that damages may be recovered for negligence causing mental distress alone. *Reese v. W. U. Tel.*

Co., 123 Ind. 294; *W. U. Tel. Co. v. Stratemeier*, 6 Ind. App. 125; *W. U. Tel. Co. v. Newhouse*, 6 Ind. App. 422.

The courts which hold that damages for mental suffering alone may be recovered base the recovery upon the fact that the language of the message gives direct notice to the telegraph company that the message concerns such event or events as that negligence on the part of the company is likely to be followed by mental distress. The telegraph company, then, has the measure of responsibility, and is held liable for special damages for negligence. *Crow. Electricity*, sec. 649. The language of the message of appellee, "Cannot come to-day. Will come to-morrow," did not advise the company that a failure to deliver it would be likely to cause mental distress. It does not even request any one to meet her at the station. It does not suggest that humiliation or mental distress would reasonably result from the failure of the person to whom it was addressed to be present upon her arrival at the place of destination.

The physical discomforts of which plaintiff complains, occasioned by her walking and carrying heavy parcels from the railroad station to her home, a distance of four blocks, are damages too remote to permit a recovery. Upon this branch of the case we cite: *Stafford v. W. U. Tel. Co.*, 73 Fed. Rep. 273; *McAllen v. W. U. Tel. Co.*, 70 Tex. 243; *W. U. Tel. Co. v. Smith* (Tex. Sup.), 13 S. W. Rep. 169.

In *Stafford v. W. U. Tel. Co.*, *supra*, plaintiff, who was traveling with her sick mother, gave to a telegraph company, at a station on her route, a message addressed to her brother, as follows: "Mother sick. Meet us this evening at D." The company failed to deliver the message. The court held that damages caused to the sender by being compelled to search at night in a strange place for her brother's residence, with exposure producing illness, or caused either to the sender or addressee by the death of

demurrer was sustained, and judgment entered thereon for the defendant for costs. The plaintiff alleges error in this ruling of the court, and presents it here by petition in error.

U. Hoyt, for plaintiff in error.

Karnes, Holmes & Krauthoff, Arthur Francis Smith and George H. Fearons, for defendant in error.

ALLEN, J. (after stating the facts): The contention on behalf of the plaintiff is that he was not a party to the contract, and is not bound by its terms; that the defendant is a corporation, enjoying corporate privileges derived from the public, and charged with the performance of certain public services; that, by reason of its relations to the public, it was bound to correctly transmit and promptly deliver the message to him.

The claim of liability because of a failure to perform a public duty, independent of any contract, finds some support in the authorities. 25 Am. & Eng. Enc. Law, 826; Thomp. Elect. sec. 427. It will be noticed that this is not an action to recover damages for delivering a changed message, whereby the receiver was misled. In such a case it may well be argued that a liability arises from the wrongful act of the defendant in delivering to him a false message, whereby he is misled to his injury, and that this liability is wholly independent of any contract made by the sender of the message without authority of the receiver. In this case, however, the plaintiff was not misled by any act of the defendant. The defendant, at most, merely failed to perform its undertaking to promptly transmit and deliver the message. Just how a liability to perform that service can arise independent of any contract with the sender of the message, we are unable to perceive. A telegraph company certainly is under no obligation to transmit messages except when

motion for a new trial having been denied, it prosecutes this appeal.

The first and second grounds for a new trial need not be noticed. The third ground is that the verdict is not sustained by sufficient evidence, and is contrary to law. There was proof produced by appellees conducing to show that they had a load of mules at the time, which they could and would have shipped to Atlanta the 21st of December, 1893, if the message had been delivered to J. W. Russell within a reasonable time after it reached Franklin, and that they sustained a loss, by reason of not shipping the mules on that day, to the amount of more than \$125; hence the jury were authorized to find the amount named. This case is unlike the case of *Smith v. W. U. Tel. Co.*, reported in 83 Ky. 104. The damages in this case at bar were not remote or speculative, in a legal sense.

Instructions Nos. 1, 2, 3 and 4 given by the court were as favorable to appellant as it was entitled to; and, if this be true, then the instructions asked by appellant were properly refused by the court.

It is very ably argued by appellant's counsel that the printed terms on the back of the paper on which the message was sent were assented to by the sender, and, therefore, became a part of the contract, and binding upon the sender and receiver, and it is especially insisted that the stipulation as to repeating the message is a complete bar to a recovery of more than 58 cents, the amount paid for the sending of the message; and we are referred to various decisions of the courts of last resort in support of that contention. It is true that in *Camp v. this appellant*, 1 Metc. (Ky.) 164, the same or a similar stipulation as the one in question, as to the repetition of messages, was held to be valid, but that case was decided in 1858, and before the adoption of the present Constitution; and it will also be seen that there was no allegation by plaintiff that the mis-

imposed by section 3706, How. Ann. St. (being section 14, Act No. 59, Acts 1851, entitled "An act to authorize the formation of telegraph companies"), cannot be applied to a railroad company incorporated under the general railroad laws, nor to any person or corporation other than telegraph companies incorporated under the above act. (2) That the defendant is engaged in interstate business, and that the penalty imposed by the Michigan statute (section 3706) upon a company so engaged, and applied to interstate business, is in violation of the Constitution of the United States. (3) That the court erred in finding as a fact that the defendant did not transmit the message with impartiality and good faith, and in refusing to find that the message was not transmitted because of mistake or oversight, and that it was not withheld intentionally, or because of any discrimination, impartiality or bad faith. (4) That the penalty allowed by the statute can be recovered only for the wilful withholding of a dispatch as a discrimination against the sender, and because of partiality and bad faith; that it cannot be recovered for mere failure to transmit without any wrongful motive.

We need discuss but one question. The finding of bad faith has no support by the proofs. It is also contradicted by the further finding of the court that the message was misplaced by defendant's agent at Grand Rapids, and so escaped the attention of the operator, and was not sent. The evidence supports this finding. There is a material distinction between mistake or oversight and partiality and bad faith. The statute imposes the duty to transmit messages with impartiality and good faith under a penalty of \$100 for each neglect or refusal to do so. We need not determine in this case whether this statute has reference to a railroad company owning and operating a telegraph line within this State, as we are satisfied that the judgment cannot stand under the evidence. This is a penal statute, and must be strictly construed. *Fox v. Fancher*,

breach of duty in three cases—bad faith, partiality and discrimination; and the complaint before us shows, at most, a mere neglect of duty, and entirely fails to show bad faith, partiality or discrimination.” See, also, *W. U. Tel. Co. v. Swain*, 109 Ind. 405; *W. U. Tel. Co. v. Griffin* (Ind. App.), 27 N. E. Rep. 113; *W. U. Tel. Co. v. Rountree* (Ga.), 18 S. E. Rep. 979; *Wolf v. W. U. Tel. Co.* (Ga.), 19 S. E. Rep. 717; *Frauenthal v. W. U. Tel. Co.*, 50 Ark. 78; *Baltimore & O. Tel. Co. v. State*, and *W. U. Tel. Co. v. Sloan* (Ark.), 6 S. W. Rep. 513.

The court should have found, under the evidence, that the mere fact that the telegram was mislaid and forgotten by the agent, and in consequence did not come to the notice of the operator of defendant, was a mere neglect of duty, and that no bad faith, within the terms of the statute, was shown, and, upon such finding, have entered judgment in favor of defendant. The judgment of the court below must be reversed, and judgment entered here in favor of defendant, with costs of both courts. The other justices concurred.

J. A. SHINGLEUR & CO. v. WESTERN UNION TELEGRAPH COMPANY.

Mississippi Supreme Court, June 3, 1895.

(72 Miss. 1080.)

The sender and the addressee of a telegram altered in the course of transmission have each a right of action against the telegraph company. The former may sue in either contract or tort; the latter in tort.

The sender is not liable to the addressee for loss due to error in the transmission of a telegram; and if he voluntarily makes good such loss, he has no cause of action against the company for his recoupment. The addressee should have been remitted to its own adequate remedy.

660), decided in 1889. This case contains an exhaustive review of the authorities, and holds that the minds of the parties in case of an altered message have never met, and that neither can be bound to the other unless the telegraph company is the agent of the sendee, and this is repudiated on principle and authority. The English view, in so far as it predicates the right of the sendee to sue on contract alone, leads to one very manifestly unjust result, to wit, that since the sendee cannot sue the company (as held in *Playford's case*, *supra*) nor the sender (as held in *Henkel's case*, *supra*), he is remediless.

According to what is called the American doctrine (Gray on Tel. sec. 104, note 3; Thompson on Electricity, sec. 426), the affirmative of the proposition under discussion is maintained; representative among the cases so holding being *Rose's case*, *Allen's Tel. Cas.* 337, in which case the principal was disclosed, and the agent not bound. In *De Rutte v. Tel. Co.*, 30 How. Pr. (N. Y.) 403, it was held that the party interested in the dispatch, whether sender or sendee, was the one who really contracted with the company, and that such person could sue in contract. In *Tel. Co. v. Dryburg*, 35 Pa. St. 298, the Supreme Court held that the company was the agent of both sender and sendee, upon very unsatisfactory reasoning, and, hence, either could sue in contract.

Turning from this view of the right of the sendee to sue the company in contract, and putting the right to sue on the ground that, in case of delivery of an altered message, upon which the sendee has acted to his damage, the sendee's right to sue is in tort for the injury to him, the wrong and the consequent damages, we find this view clearly and universally upheld by the American authorities. Gray on Telegraph, sec. 78; Thompson on Electricity, secs. 427, 428, 430, 448; *Dryburg's case*, 35 Pa. St. 298, *Sharswood's opinion*; *Rose's case*, *Allen's Tel. Cas.*

to important business affairs which required prompt attention, but it also, in express terms, demanded an immediate reply; and with a full appreciation of its importance as well as of its requirements, the defendant's manager, McLean, sent it to the plaintiffs with directions to the messenger boy by whom it was sent to wait for an answer. The answer was obtained by the messenger and securely placed in his pocket, where it remained until accidentally discovered some time on the following day; and although he returned to the defendant's office soon after leaving the plaintiffs' place of business, it does not appear that either the operator or the manager bestowed sufficient thought upon the subject to inquire if the plaintiffs had furnished him with an answer. These facts are not controverted, and it seems that the defendant seeks immunity from the negligence which they establish, gross as it is shown to be, by a provision which it has incorporated into the "terms" or "conditions" upon which it consents to transact business with the public, and which is, in effect, that whenever a message is sent to its office by one of its messengers, the latter is to be deemed the agent of the sender. This is certainly a most remarkable "regulation," and it is one of which, we have no hesitation in saying, the defendant should not be permitted to avail itself. It is a well known fact that, as competitive agencies, the various telegraph companies in this country have wires and appliances placed in the stores and offices of their patrons in the larger cities, by means of which a messenger can be summoned from the central office at any time to take a dispatch to that office. These messengers are in the employ of the companies, and they are sent in response to calls for their services in order to obtain business for the companies, which they represent; and it appears that the defendant was at this very time making use of this agency, to increase its patronage in the city of Buffalo. Now, it would be a singular condition of affairs if a patron

death nor for her inability to be present at his deathbed. For it appears that the telegram was sent after his death, and indeed announced that fact. Was her illness then caused exclusively by inability to be present at the funeral? If not, how much of her suffering was due to the fact of death, and how much to the inability to be present at the funeral? These injuries are logically pertinent. They illustrate the purely arbitrary character of the award. It was small, it is true, but it might just as well have been smaller or larger. What is clear is that it was hopelessly uncertain and devoid of substantial foundation. It was simply—in part at least—a solatium, where a solatium is inadmissible.

We think the General Term of the City Court was fully warranted in granting, as it did, a new trial, because of the trial judge's error with regard to the damages.

The order of the Appellate Term should, therefore, be reversed, and the order of the General Term of the City Court affirmed, and judgment absolute ordered for the defendant, with costs in this court and in the Appellate Term, and also in the Trial and General Terms of the City Court.

VAN BRUNT, P. J., RUMSEY, O'BRIEN and INGRAHAM, JJ., concurred.

Order of Appellate Term reversed and order of General Term of the City Court affirmed, and judgment absolute ordered for defendant, with costs in this court and in the Appellate Term, and also in the Trial and General Terms of the City Court.

unreasonable, where the time allowed is not too short to enable the party claiming damages to become aware of the injury and to present his claim properly. The reasons for this rule are obvious, and it has been upheld where the time was limited to sixty days, to thirty days, and to twenty days, after the filing of the message for transmission, though the rules as to the reasonableness of any particular length of time may change with peculiar circumstances."

In *W. U. Tel. Co. v. Dougherty*, 54 Ark. 221, the views of the court upon the proposition are expressed as follows: "We know of no principle of the common law that would prohibit it. It was not a contract to cover the negligence of the telegraph company. It was a stipulation against the delay and neglect of the plaintiff in presenting his claim, and it does not appear unreasonable. By reason of the character of the business, and the great number of messages sent over the lines of a telegraph company, and the importance of early information of claims, to enable the company to keep an account of its transactions, and the impossibility of recalling them all and accounting for them from memory after the lapse of a considerable period of time, it does not appear that a stipulation that a claim for damages should be presented in writing within sixty days from the time the message is sent is unreasonable. Such a condition is not only a stipulation against the negligence of the company, but it implies that a liability may be incurred for negligence; and it requires that one who seeks to recover damages for such negligence shall present his claim in writing within sixty days, or be held to have waived it."

In Kansas, a stipulation that "no claim for loss or damages on live stock will be allowed unless the same is made in writing before or at the time the stock is unloaded," was held to be in contravention of no statute, and repulsive to no consideration of public policy, and the

and preserve the proper evidence. It is not a regulation intended to shield the company from the consequences of a neglect of duty on its part, but prescribing a duty to be performed by the plaintiff before he should be entitled to maintain his action."

The following cases are to the same effect: *Sherrill v. W. U. Tel. Co.*, *supra*; *Smith-Frazier Boot & Shoe Co. v. W. U. Tel. Co.*, 49 Mo. App. 99; *Heimann v. W. U. Tel. Co.*, 57 Wis. 562; *W. U. Tel. Co. v. Meredith*, 95 Ind. 93.

In *Primrose v. W. U. Tel. Co.*, 14 Sup. Ct. 1098, the reasonableness and validity of such rules and regulations are discussed by Justice GRAY, of the United States Supreme Court.

Concerning the ordinary regulation which relieves the company from liability for its negligence in transmitting an unrepeatd message, Mr. Justice EARL, in *Kiley v. W. U. Tel. Co.*, 109 N. Y., at page 235, says: "That a telegraph company has the right to exact such a stipulation from its customers is the settled law in this State, and in most of the other States in the Union and in England."

It appearing that the stipulation under consideration has been upheld and enforced as a reasonable regulation, limiting no liability, in jurisdictions where, by express statutory enactment, all contracts to limit such liability are declared to be null and void, the right to exact, as a condition precedent, compliance with reasonable rules, which in no manner pertain to the carrier's liability for negligence, is not affected by the provision of our statute which authorizes a contract limiting the liability of a common carrier.

In a leading case (*Express Co. v. Caldwell*, 21 Wall. 264), Mr. Justice STRONG, speaking for the Supreme Court of the United States, says: "The question, then, which is presented to us by this record, is whether the stipulation asserted in the defendant's plea is a reasonable one, not

These authorities are in accord with our own case of *Glenn & Son v. Southern Express Co.*, 86 Tenn. 594.

In that case it was held that a stipulation in a receipt that the express company should not be liable for money lost by its default, unless claim therefor is made in writing at its office within thirty days after its delivery to the company, is reasonable and valid; but, where the failure to make the claim as required by such stipulation occurs without fault or negligence of the parties entitled to the money, then such failure will be excused, and will not prevent a recovery for the loss.

We are, therefore, of the opinion the instruction asked was properly refused.

[The portion of the opinion here omitted relates to amount of damages and competency of evidence.]

For the reasons indicated the judgment is reversed, and the cause remanded for a new trial.

WESTERN UNION TELEGRAPH COMPANY V. NAGLE & WINN.

Texas Court of Civil Appeals, Nov. 13, 1895.

(11 Civ. App. 589.)

FAILURE TO TRANSMIT TELEGRAM—NOTICE OF IMPORTANCE—DAMAGES.

Telegram in words, "Kammerer renews orders," followed by further words in cipher, *held*, to sufficiently indicate the importance of prompt delivery, especially when taken in connection with the circumstances that the company's manager at the initial office knew the business of the sender and addressee, who were partners; also knew that they were in the habit of corresponding with Kammerer by telegraph; and assumed that the message related to the business in which plaintiffs

relationship existing between Clara and Rufe, her mental anguish could not have been contemplated by it, as a result of a breach of the contract, when the same was made. Speaking for the court, Justice HENRY said: "It is well known to the public, and cannot be unknown to telegraph companies, that the utmost brevity of expression is cultivated in correspondence by telegraph. It is as well known that that mode of communication is chiefly resorted to in matters of importance, financially and socially, requiring great dispatch. When such communications relate to sickness and death there accompanies them a common sense suggestion that they are of importance, and that the persons addressed have in them a serious interest. It would be an unreasonable rule, and one not comporting with the uses of the telegraph, to hold that the dispatcher will be released from diligence unless the relations of the parties concerned, as well as the nature of the dispatch, are disclosed. When the general nature of the communication is plainly disclosed by its terms, instead of requiring the sender to communicate to the unwilling ears of the busy operator the relationship of the parties concerned, a more reasonable rule will be, when the receiver of the dispatch desires information about such matters, for him to obtain it from the sender, and, if he does not do so, to charge his principal with the information that inquiries would have developed."

And in *Telegraph Co. v. Edsall*, 74 Tex. 333, where the telegram related to a matter of business, the same judge said: "When notice of the main fact was given, we think the defendant was chargeable with notice of every incidental fact that would attend the transaction that it could then have ascertained by the most minute inquiry. Notice of the main purpose was sufficient to put it upon inquiry as to the attendant details, and it is chargeable with all it could have learned by such inquiries."

In the case at bar, appellant's agents in charge of its

and his father, to write his father on the subject. Said letter was received by the father on the 13th of September, and on the same day he went to a lawyer in Gainesville, and gave a mortgage on real estate worth \$1,000 to Davenport to secure him against loss as surety on the bail bond. Davenport received this mortgage on the 14th, and on the 15th of September signed the bail bond, and appellee was released from jail. If the father had gone to Ardmore on the 9th or 10th, and offered the security to Davenport as indemnity which he gave later, Davenport would have made appellee's bail bond at that time, and appellee would have been released. The father of appellee had resided in Cook county for 42 years, and in Gainesville, on one of the principal streets of the city, for 24 years, and within four blocks of appellant's office. He was well known in the city, as was also his place of residence, and he knew on the 9th of September where Dora Gossett lived, and inquiry of him would have, doubtless, resulted in the delivery of the message to her on that evening. The only effort made to deliver the message was between 7.06 and 7.52 o'clock P. M. of September 9th. The operator at Gainesville testified that when the message was returned to her, at 7.52, by the messenger boy, she hung it on the hook, where it remained until it was called for by Dora Gossett. The messenger boy's evidence, to the effect that he made inquiry of one Mrs. Gossett, who told him that Dora lived at Macafees, $1\frac{1}{2}$ miles in the country, is contradicted by Guy Gossett, her son, who testified that the messenger came to his father's house, and inquired of him, not his mother, where Dora Gossett lived, and that he told him she lived in the south part of town, and pointed down in the direction of her residence; that neither he nor his mother told him she lived in the country. The failure to deliver the message to Dora Gossett on the 9th of September was the result of culpable negligence on the

with due diligence. By the decision of the Supreme Court the claim for damages was not sustained, and the judgment given was solely for the penalty.

The only question, therefore, before this court is whether the statute of the State of Georgia, providing for the recovery of such penalty is a valid exercise of the power of the State in relation to messages by telegraph from points outside and directed to some point within the State of Georgia.

The plaintiff in error insists that the act in question is a violation of that portion of section 8 of article 1 of the Federal Constitution, which empowers Congress "to regulate commerce with foreign nations and among the several States and with the Indian tribes." The validity of the statute is based upon the general power of the State to enact such laws in relation to persons and property within its borders as may promote the public health and public morals and the general prosperity and safety of its inhabitants. This power is somewhat generally described as the police power of the State, a detailed definition of which has been said to be difficult, if not impossible, to give. However extensive the power may be, it cannot encroach upon the powers of the Federal government in regard to rights granted or secured by the Federal Constitution. *New Orleans Gas Co. v. Louisiana Light Co.* 115 U. S. 650, 661; *Walling v. Michigan*, 116 U. S. 446, 460; *Gulf, Colorado & Santa Fe Railway v. Hefley*, 153 U. S. 98. It has been settled by the adjudications of this court that telegraph lines, when extending through different States, are instruments of commerce which are protected by the above clause in the Federal Constitution and that the messages passing over such lines from one State to another constitute a portion of commerce interstate. *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U. S. 1; *Telegraph Co. v. Texas*, 105 U. S. 460; *Western Union Telegraph Co. v. Pendleton*

every enactment which may incidentally affect commerce and the persons engaged in it that necessarily constitutes a regulation of commerce within the meaning of the Constitution. *Sherlock v. Alling*, 93 U. S. 99; *State Tax on Railway Gross Receipts*, 15 Wall. 284; *Mobile County v. Kimball*, 102 U. S. 691; *Smith v. Alabama*, 124 U. S. 465. A State statute was held valid in this last cited case which provided for an examination of engineers of locomotives by a State board of examiners, and it was applied to an engineer engaged in running a locomotive on one continuous trip from Mobile in Alabama to Corinth in Mississippi. It was held to be a valid police regulation.

Legislation which is a mere aid to commerce may be enacted by a State, although at the same time it may incidentally affect commerce itself. *Mobile County v. Kimball*, 102 U. S., already cited.

On the other hand, a State statute which only assumed to regulate those engaged in interstate commerce, while passing through the particular State, has been held void because it in effect and necessarily regulated and controlled the conduct of such persons throughout the entire voyage, which stretched through several States. Such is the case of *Hall v. De Cuir*, 95 U. S. 485, 489.

The statute in that case, after providing that common carriers of passengers should have the right to refuse certain classes of undesirable and improper persons passage on their vehicles, gave the power to carriers to expel such persons after admission, and also gave them power to regulate all who should commit any act in violation of the regulations prescribed for the management of the carrier after such rules and regulations of the carrier were made known, "provided such rules and regulations do not discriminate on account of race or color." It also prohibited all persons from being common carriers of passengers,

the telegraph company to be acted upon, to exercise care that the telegram so delivered should be authentic and accurate. The cases of *May v. W. U. Tel. Co.*, 112 Mass. 90, and *Elwood v. W. U. Tel. Co.*, 45 N. Y. 549, sustain the right of a person to whom a telegram is addressed and to whom it is delivered by the telegraph company, to recover for damages caused by negligence of the character indicated. But a telegraph company cannot be liable to a stranger to the company and to the telegram,—one to whom it has never delivered the message, and to whom it owes no duty whatever,—merely because he had seen the telegram and acted upon it to his injury. *W. U. Tel. Co. v. Wood*, 6 C. C. A. 432; 57 Fed. Rep. 471; *Savings Bank v. Ward*, 100 U. S. 195.

The direction to the jury was correct and the judgment is affirmed.

NOTE.—In addition to the above nineteen cases, the following have reference to negligence of telegraph companies in the transmission or delivery of messages.

ALABAMA.—*W. U. Tel. Co. v. Crawford*, Supreme Court, November, 1895 (110 Ala. 460).

Telegraph companies cannot, by conditions in their blanks, exempt themselves from liability in case of unrepeatd messages.

ARKANSAS.—*W. U. Tel. Co. v. Aubrey*, Supreme Court, February 1, 1896 (61 Ark. 613).

Question of damages only.

GEORGIA.—*W. U. Tel. Co. v. Davis*, Supreme Court, Feb. 27, 1895 (96 Ga. 520).

Held, that upon the facts the company was not chargeable with negligence to which the delay in transmitting the telegram was due.

Woodburn v. W. U. Tel. Co., Supreme Court, June 10, 1895 (23 S. E. Rep. 116).

Action for penalty properly held abated by repeal of statute pending the action.

Mondon v. W. U. Tel. Co., Supreme Court, July 29, 1895 (96 Ga. 499).

Question of measure of damages, and of competency of evidence bearing on same.

Meadors v. W. U. Tel. Co., Supreme Court, Oct. 5, 1895 (66 Ga. 788).

Per CURIAM: Since the decision of this case in the lower court, the telegraph penalty acts having been repealed, the public interests will not be subserved by an elaboration of the reasons which influence Justice ARKINSON to this conclusion, and therefore he files no opinion. The Chief Justice, dissenting, adheres to his views as expressed in his dissenting opinion filed in Mathis case, 21 S. E. Rep. 564, 1089.

ILLINOIS.—*W. U. Tel. Co. v. Lyman*, Appellate Court, Nov., 1895 (60 Ill. App. 124).

Without some evidence of knowledge thereof, sender or addressee can not be held bound by stipulation contained in blank.

W. U. Tel. Co. v. Beck, Appellate Court, March, 1895 (58 Ill. App. 564).

Stipulation requiring notice of claim to be presented within sixty days held to be reasonable. Certain correspondence held not to constitute sufficient notice.

W. U. Tel. Co. v. Hart, Appellate Court, Oct., 1895 (63 Ill. App. 120).

A person discovering that error must have been made must use reasonable and diligent effort to make the loss as small as possible.

Webbe v. W. U. Tel. Co., Appellate Court, March, 1896 (64 Ill. App. 331).

Failure to observe the stipulation requiring notice of claim to be presented within sixty days held fatal to recovery. Stipulation held binding on plaintiff who had used similar blanks for sixteen years in his business and knew there were conditions printed in them, but had never read them.

INDIANA.—*W. U. Tel. Co. v. Cain*, Appellate Court, Jan. 9, 1896 (14 Ind. App. 115).

Mental anguish alone sufficient to warrant recovery.

IOWA.—*Taylor v. W. U. Tel. Co.*, Supreme Court, Oct. 16, 1895 (64 Iowa Rep. 660).

The South Dakota statute imposing a penalty for negligence in the transmission of telegrams has no extra territorial force.

The South Dakota statute prohibiting labor on Sunday is no defence to an action for damages for delay of a telegram relating to transportation of horses through that State on Sunday.

Brumfield v. W. U. Tel. Co., Supreme Court, April 11, 1896 (66 N. W. Rep. 896).

In an action for delay of a telegram, recovery held precluded by failure to prove time of delivery at initial or receipt at terminal office.

KANSAS.—*W. U. Tel. Co. v. Woods*, Supreme Court, May 9, 1896 (Kan. 737).

If the addressee of a telegram has both a place of business and a residence at the place where the terminal office is located, the company should deliver the message either to some one in charge at the place of business or to some member of the family at the residence.

Measure of damages for failure to deliver commercial telegram.

Duty of addressee to reduce injury.

Company liable to beneficiary of telegram, though other than sender or addressee, if his interest is disclosed by the message.

Swain v. W. U. Tel. Co., Court of Civil Appeals, Feb. 13, 1896 (34 S. W. Rep. 783).

Notice of claim presented within the sixty days required by stipulation in blank, but claiming for damages to wife only, not availing as to suit by husband for damages for his mental distress.

W. U. Tel. Co. v. Garrett, Court of Civil Appeals, Feb. 17, 1896 (34 S. W. Rep. 649).

Telegraph company not liable for mental distress of addressee prevented, by failure to deliver telegram, from visiting his dying step-father, unless company apprised of tender and affectionate relations existing between them.

W. U. Tel. Co. v. Randles, Court of Civil Appeals, Feb. 19, 1896 (34 S. W. Rep. 447).

Telegram announcing death of father of addressee affords sufficient proof that the addressee was the beneficiary of the telegram and of his mental distress at failure to attend the funeral.

W. U. Tel. Co. v. Stiles, Supreme Court, March 3, 1896 (34 S. W. Rep. 438).

Statements of deceased person whose illness was announced by delayed telegram, indicating his desire to see his brother, the addressee, which were afterwards communicated to the latter, held not admissible on issue of mental distress in addressee's action against the company.

W. U. Tel. Co. v. Pruett, Court of Civil Appeals, March 5, 1896 (35 S. W. Rep. 78).

Sender of message delivering same to agent of company away from telegraph office, written on plain paper, not bound by stipulation on blank to which paper subsequently attached by agent, exempting company from liability on messages until presented to and accepted at the transmitting office.

Such stipulation not available as a defence, when the injury would have been avoided if transmission had been promptly made after the message reached the office.

W. U. Tel. Co. v. Davis, Court of Civil Appeals, March 14, 1896 (35 S. W. Rep. 189).

Facts held not to warrant recovery in action for damages due to delay of commercial telegram.

W. U. Tel. Co. v. Menzer, Court of Civil Appeals, March 26, 1896 (35 S. W. Rep. 886).

Question of pleading and evidence.

W. U. Tel. Co. v. Stiles, Court of Civil Appeals, March 26, 1896 (35 S. W. Rep. 76).

Unavoidable delay in delivery constitutes no breach of duty on the part of the telegraph company.

W. U. Tel. Co. v. Warren, Court of Civil Appeals, April 25, 1896 (36 W. Rep. 814).

Addressee may recover for mental distress.

Company bound to deliver beyond free-delivery limit, if solvent sender agreed to pay additional charges if the place of address should prove to be beyond the limit.

W. U. Tel. Co. v. Anderson, Court of Civil Appeals, May 2, 1896 (37 W. Rep. 618).

Facts held to show negligence and no contributory negligence.

W. U. Tel. Co. v. Drake, Court of Civil Appeals, May 30, 1896 (36 S. 1 Rep. 786).

If the sender contract with the company for a special messenger deliver the message to the addressee, who resides four miles from the terminal office, and guarantee payment for such delivery, the company bound to deliver by special messenger if the addressee with reasonable diligence can be found.

W. U. Tel. Co. v. Hargrove, Court of Civil Appeals, June 18, 1896 (36 W. Rep. 1077).

Company having received message for delivery at place three miles from an office, but where the agent at the initial office supposed the company had an office, held liable for failure to deliver.

W. U. Tel. Co. v. Teague, Court of Civil Appeals, March 7, 1896 (36 W. Rep. 801).

Company held liable for failure to deliver telegram addressed to student of medical college situated just beyond free delivery limit.

Johnson v. W. U. Tel. Co., Court of Civil Appeals, Oct. 24, 1896 (38 W. Rep. 65).

Husband held not entitled to recover on a complaint alleging as the sole injury his wife's mental anguish caused by failure to receive a telegram from him stating when he would be present at the sick bed of his mother.

W. U. Tel. Co. v. Clark, Court of Civil Appeals, Nov. 7, 1896 (38 S. 1 Rep. 225).

A resident of Indian Territory may sue in Texas court for breach of duty of a foreign telegraph company in respect to a telegram delivered to the company in Texas for transmission to plaintiff in Indian Territory.

Mother, addressee of telegram announcing daughter's illness, may maintain action for failure to deliver.

W. U. Tel. Co. v. Gibson, Court of Civil Appeals, Nov. 18, 1896 (39 W. Rep. 198).

Evidence that the sender told the operator that the person whose death was announced by a telegram was a son-in-law of the addressee, plaintiff and that the plaintiff would attend the funeral if he received the message in time, does not charge the telegraph company with knowledge

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Statutes providing for taxation held valid.

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Telephone and telephone companies.

Company is *quasi* common carrier and bound to serve public with impartiality, good faith and diligence, this especially by statute in Indiana.

May make reasonable regulations, but not such as to relieve company of duties to patrons by reason of its public character.

It is part of duty of telephone company, in relation to its toll service business, to notify party with whom telephone interview is sought, if within reasonable distance, and within reasonable time.

Regulation that company will not undertake to deliver messages, and that any person who assists in conversation does so as agent of patron and not of company, does not excuse company's failure to give notification.

Central Union Teleph. Co. v. Swoveland (Ind.) 61

Use of streets and highways by telephone companies under legislative and municipal consent does not constitute new easement for which abutting owner entitled to compensation.

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Company is telegraph company and has right of eminent domain.

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Poles are devoted to public use, especially when they support fire-alarm telegraph wire.

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Ordinance making company liable for damages to public or private property by reason of its franchise, does not require compensation to abutting owners before placing poles.

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